DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-167
Title: United States, Petitioner
v.
Anthony Davila
Docketed: August 3, 2012
Linked with 11A1243
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (10-15310, 11-10224)
Decision Date: December 21, 2011
Rehearing Denied: April 6, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 25 2012	Application (11A1243) to extend the time to file a petition for a writ of certiorari from July 5, 2012 to August 4, 2012, submitted to Justice Thomas.
Jun 26 2012	Application (11A1243) granted by Justice Thomas extending the time to file until August 4, 2012.
Aug 3 2012	Petition for a writ of certiorari filed. (Response due September 3, 2012)
Sep 19 2012	DISTRIBUTED for Conference of October 5, 2012.
Sep 20 2012	Response Requested . (Due October 22, 2012)
Oct 9 2012	Order extending time to file response to petition to and including November 30, 2012.
Nov 29 2012	Brief of respondent Anthony Davila in opposition filed.
Dec 11 2012	Reply of petitioner United States filed.
Dec 12 2012	DISTRIBUTED for Conference of January 4, 2013.
Jan 4 2013	Petition GRANTED.
Feb 11 2013	SET FOR ARGUMENT ON Monday, April 15, 2013.
Feb 13 2013	Joint appendix filed. (Statement of costs filed.)
Feb 13 2013	Brief of petitioner United States filed.
Mar 1 2013	CIRCULATED.
Mar 4 2013	Record received from U.S.D.C. for Southern District of Georgia. (1 box) There are sealed documents in this record.
Mar 11 2013	Record from U.S.C.A. for 11th Circuit is electronic.
Mar 15 2013	Brief of respondent Anthony Davila filed. (Distributed)
Mar 22 2013	Brief amici curiae of 57 Criminal Law and Procedure Professors filed. (Distributed)

Mar 22 2013	Brief amici curiae of Scholars and practitioners of legal and judicial ethics, et al filed. (Distributed)
Mar 22 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Apr 8 2013	Reply of petitioner United States filed. (Distributed)
Apr 15 2013	Argued. For petitioner: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Robert M. Yablon, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

12-167

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY DAVILA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

KATHRYN KENEALLY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

ERIC J. FEIGIN
Assistant to the Solicitor General

FRANK P. CIHLAR
S. ROBERT LYONS
GREGORY VICTOR DAVIS
DEBORAH K. SNYDER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

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ANTHONY DAVILA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 664 F.3d 1355.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2011. A petition for rehearing was denied on April 6, 2012 (App., *infra*, 9a-10a). On June 26, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 4, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 11(c)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

Rule 11(h) of the Federal Rules of Criminal Procedure provides:

> A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Georgia, respondent was convicted of conspiring to file fraudulent tax-refund claims, in violation of 18 U.S.C. 286. App., *infra*, 1a. The district court sentenced respondent to 115 months of imprisonment, to be followed by three years of supervised release. 09-cr-60 Docket entry No. 95, at 2-3 (S.D. Ga. Nov. 16, 2010). The court of appeals vacated the conviction and sentence and remanded for further proceedings. App., *infra*, 1a-5a.

1. Respondent defrauded the federal government by filing more than 130 falsified tax returns with the Internal Revenue Service (IRS). Docket entry No. 121, at 20-

26 (filed Jan. 11, 2011) (Plea Hearing Tr.). According to an informant, respondent would identify state prisoners on the Florida Department of Corrections website, obtain the prisoners' personal information from casefiles at the local courthouse, and then file federal tax-refund claims in the prisoners' names to be paid into his own bank accounts. *Id.* at 20-22. The IRS issued refunds on 87 of the claims, and respondent banked more than $423,500 as a result of his scheme. *Id.* at 24.

In May 2009, a federal grand jury in the Southern District of Georgia indicted respondent on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 286 and 2; 11 counts of presenting a false claim to the United States, in violation of 18 U.S.C. 287 and 2; 11 counts of mail fraud, in violation of 18 U.S.C. 1341 (Supp. II 2008); and 11 counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. Docket entry No. 1 (May 7, 2009). The district court appointed counsel to represent him. Docket entry No. 33 (July 20, 2009).

2. Respondent subsequently sent a letter to the court requesting different counsel. C.A. E.R. Ex. B. One of his complaints was that his counsel had "never mentioned a defense at all" other than "to plead guilty." *Id.* at 1-2. On February 8, 2010, a magistrate judge held an ex parte hearing with respondent and his counsel and denied respondent's request. See Docket entry No. 127, at 13 (filed Jan. 18, 2011) (Ex Parte Hearing Tr.).

At the hearing, the magistrate judge stated that "oftentimes * * * the best advice a lawyer can give his client" is to plead guilty. Ex Parte Hearing Tr. 8. The magistrate judge also raised the possibility that respondent's counsel might not have discussed other strategies because "there may not be a viable defense to these

charges." *Id.* at 11. And the magistrate judge later stated that

> [t]he only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance. I don't know what the guidelines of this case would figure out to be but not as bad as armed bank robbery but probably pretty bad because your criminal history score would be so high. * * * [M]ake no mistake about it, that two- or three-level reduction for acceptance is something that you have the key to and you can ensure that you get that reduction in sentence simply by virtue of being forthcoming and not trying to make yourself look like you really didn't know what was going on. In order to get the reduction for acceptance, you've got to come to the cross. You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction.

Id. at 16-17.

3. Approximately a month after the ex parte hearing, respondent filed a motion demanding a speedy trial.

Docket entry No. 46 (Mar. 5, 2010). The district court set a trial date for April 2010, which was later continued at the government's request. Docket entry No. 53 (Mar. 25, 2010), No. 56 (Apr. 2, 2010).

On May 11, 2010, more than three months after the ex parte hearing, respondent and his counsel signed a plea agreement pursuant to which respondent would plead guilty to the conspiracy charge in exchange for dismissal of the other 33 charges. Docket entry No. 62 (May 17, 2011). Six days later, respondent entered his guilty plea before a district judge (not the magistrate judge who had presided over the ex parte hearing). Plea Hearing Tr. 1-43. Respondent stated under oath at the hearing that no one had forced or pressured him to plead guilty. *Id.* at 39. The district judge found that the plea was "voluntary, knowing, and not the result of any force, pressure, threats, or promises, other than the promises made by the government in the plea agreement." *Id.* at 41.

4. In September 2010, the magistrate judge granted respondent permission to proceed pro se and appointed his prior counsel as stand-by counsel. See Docket entry No. 122 at 4 (filed Jan. 11, 2011) (Sentencing Tr.). Respondent then moved to vacate his plea and to dismiss the indictment, alleging that the government had knowingly included false statements in the indictment and that his counsel had given him bad advice about whether to admit the factual basis for his plea. Docket entry No. 79 (Sept. 15, 2010), No. 87 (Oct. 26, 2010).

When the district judge took up the matter at the beginning of respondent's sentencing hearing, respondent explained to the district judge that the guilty plea had been a "strategic decision" designed to expose the

alleged government misconduct. Sentencing Tr. 5, 7, 8. Respondent also asserted that his plea decision had been influenced by misinformation from his counsel about the effect that the plea would have in a separate prosecution against him in another jurisdiction. *Id.* at 10-11. Neither respondent's written nor oral submissions in support of his plea-withdrawal request suggested that his decision to plead guilty had been influenced by the magistrate judge's remarks at the ex parte hearing (or even mentioned those remarks at all). See Docket entry No. 79, 80, 84, 87; Sentencing Tr. 3-19.

The district judge declined to set aside the plea, finding that respondent had "failed to provide * * * any evidence of government misconduct" and that "it is clear * * * that the entry of the guilty plea * * * was knowing and voluntary." Sentencing Tr. 15-18. The district judge sentenced respondent to 115 months of imprisonment. *Id.* at 41.

5. The court of appeals assigned respondent's trial counsel to represent him on appeal. 10-15310 Docket entry (11th Cir. Nov. 29, 2010). Pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), respondent's counsel filed a motion to withdraw and a brief explaining why no nonfrivolous grounds for appeal existed. 10-15310 Docket entry (11th Cir. Apr. 4, 2011). Respondent filed his own pro se brief seeking to set aside his conviction. 10-15310 Docket entry (11th Cir. Apr. 22, 2011).

The court of appeals denied counsel's *Anders* motion and ordered further briefing on an issue that neither respondent nor his counsel had identified in their briefs. App., *infra*, 6a-8a. Specifically, the court stated that its "independent review" of the record had "revealed an irregularity in the statements of a magistrate judge,

made during a hearing prior to [respondent's] plea, which appeared to urge [respondent] to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences." *Id.* at 7a. The court requested that respondent's counsel address whether this amounted to reversible error under Federal Rule of Criminal Procedure 11(c)(1), which states that a court "must not participate in [plea] discussions." See App., *infra*, 7a-8a.

Respondent (through his counsel) then filed a brief requesting that his guilty plea be set aside on Rule 11(c)(1) grounds. Resp. C.A. Br. 17-45. He argued that the magistrate's comments warranted such relief even under the plain-error standard of review generally applicable to errors raised for the first time on appeal. *Ibid.* In response, the government conceded that the magistrate's comments had violated Rule 11(c)(1), but contended that respondent could not meet the plain-error standard's requirement that he show an effect on his substantial rights as a prerequisite to relief. Gov't C.A. Br. 11-26. In particular, the government contended that respondent could not show "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 15 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004)); see *id.* at 14-26. The government pointed out the three-month gap between the comments and the plea; the different judge who presided over the plea and sentencing hearings; respondent's denial at the plea hearing that anyone had pressured or coerced his plea; respondent's later explanation to the district judge that he had pleaded guilty for "strategic" reasons; and the failure of either respondent or

his counsel to identify the issue before the court of appeals raised it. *Id.* at 11-12.

6. The court of appeals vacated respondent's conviction and remanded the case with instructions that it be reassigned to a different district judge. App., *infra*, 5a. It recognized that "[w]here, as here, the defendant fails to object to an asserted Rule 11 violation before the district court, we review the alleged violation for plain error." *Id.* at 3a. And it explained that "[u]nder the plain error standard, the defendant ordinarily must show that: (1) error existed (2) the error was plain, and (3) it affected the defendant's substantial rights; and (4) it seriously affected the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks omitted).

The court nevertheless relied on circuit precedent to hold that in a case of Rule 11(c)(1) error, a defendant "need not show any individualized prejudice" to obtain relief. App., *infra*, 5a. The court explained that, in its view, "Rule 11(c)(1) states a 'bright line rule': it prohibits 'the participation of the judge in plea negotiations under any circumstances . . . and admits of no exceptions.'" *Id.* at 3a (quoting *United States* v. *Johnson*, 89 F.3d 778, 783 (11th Cir. 1996)) (brackets omitted). "Thus," it continued, "'judicial participation *is plain error, and the defendant need not show actual prejudice.*'" *Ibid.* (citing *United States* v. *Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993)) (brackets omitted). The court acknowledged that "while other circuits recognize harmless error in the context of judicial participation, we do not." *Ibid.*

7. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 9a-10a.

REASONS FOR GRANTING THE PETITION

The court of appeals has adopted the inflexible approach of automatically granting appellate relief following any degree of judicial participation in plea negotiations, regardless of whether the defendant was prejudiced. That approach cannot be squared with the text of Rule 11 or this Court's cases interpreting that Rule, which make clear that a showing of prejudice is a prerequisite for granting relief for a Rule 11 violation. It additionally conflicts with decisions in the majority of circuits that have addressed the issue and provides a windfall for defendants, like respondent, whose guilty-plea decisions were unaffected by Rule 11 error. This recurring and important issue of federal criminal procedure warrants this Court's review.

A. The Court Of Appeals Erred In Granting Relief For A Rule 11 Error Without Analyzing Prejudice

1. An appellate court's authority to set aside a criminal conviction based on an error typically "is tied in some way" to whether the error prejudiced the defendant. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004). Rule 52 of the Federal Rules of Criminal Procedure permits a reviewing court to grant relief only when an error has "affect[ed] substantial rights," Fed. R. Crim. P. 52(a)-(b), a phrase that this Court has long "taken to mean error with a prejudicial effect on the outcome of a judicial proceeding," *Dominguez Benitez*, 542 U.S. at 81 (citing *Kotteakos* v. *United States*, 328 U.S. 750 (1946)). "When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error'

inquiry—to determine whether the error was prejudicial." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). If the defendant did not make a timely objection, then Rule 52(b)'s plain-error standard "normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.*

The harmless-error and plain-error prejudice standards apply with full force when the error at issue is a violation of Federal Rule of Criminal Procedure 11. Rule 11 describes the procedures for pleas in criminal cases, including the requirement that a district court, before accepting a guilty plea, advise the defendant of various rights and determine that the defendant understands certain features of the case. Fed. R. Crim. P. 11(b). The Rule also authorizes the defendant and the government to "discuss and reach a plea agreement," but requires that a "court must not participate in these discussions." Fed. R. Crim. P. 11(c)(1); see Fed. R. Crim. P. 11(b). Subsection (h) of Rule 11 expressly states that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." The Advisory Committee Notes explain that "Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11 advisory committee's note (1983); see *United States* v. *Vonn*, 535 U.S. 55, 64 n.6 (2002) (stating that Advisory Committee Notes are a "reliable source of insight into the meaning of" Rule 11(h)).

The scope of Rule 11(h) encompasses all potential Rule 11 violations, including violations of Rule 11(c)(1)'s prohibition against judicial participation in plea negotia-

tions. The original 1983 version of Rule 11(h) explicitly provided that "*[a]ny* variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h) (1983) (emphasis added); see *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). The breadth of Rule 11(h) remains unchanged following a 2002 amendment that replaced "[a]ny variance" with "[a] variance," as the alteration was "intended to be stylistic only." Fed. R. Crim. P. 11 advisory committee's note (2002).

Although Rule 11(h) specifically addresses only the applicability of harmless-error review, this Court has held that Rule 11 violations are also subject to plain-error review under Rule 52(b). In *United States* v. *Vonn*, the Court "considered the standard that applies when a defendant is dilatory in raising Rule 11 error, and held that reversal is not in order unless the error is plain." *Dominguez Benitez*, 542 U.S. at 80; see *Vonn*, 535 U.S. at 62-74. The Court expanded on *Vonn* in *United States* v. *Dominguez Benitez*, explaining that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. In evaluating such a claim of prejudice, the reviewing court "may consult the whole record," *Vonn*, 535 U.S. at 59, including any "evidence indicating the relative significance of other facts that may have borne on [the defendant's] choice regardless of any Rule 11 error," *Dominguez Benitez*, 542 U.S.

at 84. "[R]elief on direct appeal, given the plain-error standard that will apply in many cases, will be difficult to get, as it should be." *Id.* at 83 n.9.

2. Under the court of appeals' approach here, however, relief on appeal is not "difficult to get," but is instead automatic, in cases where a district court is deemed to have participated in plea discussions in violation of Rule 11(c)(1). The court of appeals explained that it does not "recognize harmless error in the context of judicial participation." App., *infra*, 3a. Nor does it require a defendant who has forfeited his judicial-participation claim to show "any individualized prejudice" or "actual prejudice" to prevail on plain-error review. *Id.* at 3a-5a (internal quotation marks and emphasis omitted).

Nothing justifies the court of appeals' categorical excision of the prejudice inquiry that Rules 11(h) and 52 require. "It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that * * * error requires reversal without regard to the mistake's effect on the proceeding." *Dominguez Benitez*, 542 U.S. at 81. This Court has found only "a very limited class of errors" to be structural. *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (internal quotation marks and citation omitted). That limited class—which includes, for example, denial of counsel of choice, denial of self-representation, denial of a public trial, and denial of a reasonable-doubt instruction, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006)—does not include Rule 11(c)(1) errors or any other type of Rule 11 error. Indeed, the Court has expressly observed that the erroneous omission of one of Rule 11's required plea-colloquy warnings is not even

"colorably structural." *Dominguez Benitez*, 542 U.S. at 81 n.6.

Almost invariably, structural errors are "fundamental constitutional errors" that additionally "defy analysis by harmless error standards" because they "affect[] the framework within which the trial proceeds." *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999) (internal quotation marks and citations omitted). Rule 11 errors satisfy neither condition. First, Rule 11 is not "constitutionally mandated," but is instead a prophylactic rule "designed to assist" in assuring "that a defendant's guilty plea is truly voluntary." *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969); see *Halliday* v. *United States*, 394 U.S. 831, 833 (1969) (per curiam) ("[A] large number of constitutionally valid convictions * * * may have been obtained without full compliance with Rule 11."). Before the Rule was amended in 1974 to preclude judicial participation in plea discussions, some commentators described such participation as "common practice," and the amendment reflected a policy choice rather than a constitutional imperative. Fed. R. Crim. P. 11 advisory committee's note (1974). Because Rule 11's requirements lack constitutional dimension, a "formal violation" of the Rule is not constitutional error, *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979), and *a fortiori* is not "fundamental constitutional error[]," *Neder*, 527 U.S. at 7.

Second, Rule 11 error does not "infect" the entire guilty-plea process, but is simply an error in the plea process itself. See *Neder*, 527 U.S. at 8 (jury instruction error). "The concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty

plea." *Timmreck*, 441 U.S. at 784 (internal quotation marks and citation omitted). Case-specific prejudice analysis, rather than an irrebuttable presumption of prejudice, is the best way to address concerns (see App., *infra*, 3a-4a) that judicial commentary on plea discussions may coerce a defendant to plead or cast doubt on the judge's impartiality. See *United States* v. *Bradley*, 455 F.3d 453, 463 (4th Cir. 2006) (applying plain-error review notwithstanding view that judicial participation in plea discussions is frequently prejudicial); *United States* v. *Miles*, 10 F.3d 1135, 1140-1141 (5th Cir. 1993) (same for harmless-error review). Such analysis permits the reviewing court to go beyond the bare fact of judicial participation and examine both the specific comments made by the judge and any other individualized circumstances that might show how those comments did or did not affect the particular proceedings. See *Dominguez Benitez*, 542 U.S. at 84-85; *Vonn*, 535 U.S. at 74-75. The reviewing court may find, for example, that the judge's comments merely expressed what was already obvious to the negotiating parties, were entirely neutral, or even discouraged the defendant from pleading. See, *e.g.*, p. 19, *infra* (discussing lack of prejudice in this case).

3. The court of appeals has never explained how its automatic-vacatur approach for judicial-participation errors can be squared with either Rule 11(h) or this Court's decisions holding that forfeited Rule 11 errors are subject to plain-error review. To the contrary, the court's approach is the product of its uncritical reliance on circuit precedent that predates those authorities.

The court of appeals supported its approach in this case by citing two prior circuit decisions, *United States*

v. *Casallas*, 59 F.3d 1173 (11th Cir. 1995), and *United States* v. *Corbitt*, 996 F.2d 1132 (11th Cir. 1993). App., *infra*, 3a. Those decisions, in turn, cite *United States* v. *Adams*, 634 F.2d 830 (1981), a precedent from the court's origins as part of the Fifth Circuit. See *Casallas*, 59 F.3d at 1177 & n.8; *Corbitt*, 996 F.2d at 1134-1135; see also *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting Fifth Circuit cases decided before October 1, 1981 as binding precedent).

In *Adams*, the Fifth Circuit relied on its "supervisory power over the district courts" to hold that a defendant is entitled to automatic appellate relief whenever a district court participates in any way in plea discussions. 634 F.2d at 835-843. The decision's reasoning drew heavily on *McCarthy* v. *United States*, in which this Court had used its supervisory authority to vacate a plea following a plea-colloquy omission that violated a very early version of Rule 11. 394 U.S. at 464, 468-472; see *Adams*, 634 F.2d at 836-842. The reasoning and result in *Adams* were consistent with other contemporaneous decisions in which some circuits "felt bound to treat all Rule 11 lapses as equal and to read *McCarthy* as mandating automatic reversal for any one of them." *Vonn*, 535 U.S. at 70.

Those circuit decisions, however, "imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified, and by 1983 the practice of automatic reversal for error threatening little prejudice to a defendant or disgrace to the legal system prompted further revision of Rule 11"—namely, the enactment of Rule 11(h). *Vonn*, 535 U.S. at 70; see Fed. R. Crim. P. 11 advisory committee's note (1983). "[T]he one clearly expressed objective of Rule 11(h) was to end the practice * * * of

reversing automatically for any Rule 11 error" based on an "expansive reading of *McCarthy*." *Vonn*, 535 U.S. at 66; see also Fed. R. Crim. P. 11 advisory committee's note (1983) ("[A] harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings."). Rule 11(h) requires reviewing courts to disregard Rule 11 errors that do not affect substantial rights, and it thus forecloses those courts from "invok[ing] supervisory power to circumvent [that] harmless-error inquiry." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (discussing Rule 52(a)); see Fed. R. Crim. P. 11 advisory committee's note (1983) (stating that Rule 11(h) "makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11"). As this Court has explained in the Rule 52(a) context, "federal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia*, 487 U.S. at 255.

B. The Court Of Appeals' Approach Conflicts With The Decisions Of Other Circuits

1. As the decision in this case recognized, "other circuits recognize harmless error in the context of judicial participation" and thus do not follow the Eleventh Circuit's automatic-vacatur approach. App., *infra*, 3a. Indeed, that is the practice in the majority of circuits that have squarely addressed the question presented. Decisions in the First, Third, Fourth, Fifth, and Seventh Circuits have all inquired into prejudice as a prerequisite to vacating a guilty plea on grounds of judicial participation in plea negotiations. See *United States* v.

Pagan-Ortega, 372 F.3d 22, 27-28 (1st Cir. 2004); *United States* v. *Ebel*, 299 F.3d 187, 191 (3d Cir. 2002); *Bradley*, 455 F.3d at 463 (4th Cir.); *Miles*, 10 F.3d at 1140-1141 (5th Cir.); *United States* v. *Kraus*, 137 F.3d 447, 457 (7th Cir. 1998).

The Fifth Circuit's decision in *United States* v. *Miles* puts the circuit conflict in particularly stark relief. As previously noted (p. 15, *supra*), the seminal precedent supporting the Eleventh Circuit's automatic-vacatur rule, *Adams* v. *United States*, was actually a Fifth Circuit decision. But in the Fifth Circuit itself, *Adams* is no longer good law. The Fifth Circuit recognized in *Miles* that whereas under *Adams*, it "might have found that a guilty plea entered after judicial participation was reversible *per se*," Rule 11(h) and a recent en banc decision "compel[led] harmless error review." 10 F.3d at 1140-1141; see *United States* v. *Johnson*, 1 F.3d 296 (5th Cir. 1993) (en banc).

The Second Circuit has indicated that it likewise applies harmless-error review to violations of Rule 11(c)(1). See *United States* v. *Paul*, 634 F.3d 668, 673 (2d Cir.) ("Even if the District Court's remarks constituted error (which they do not), such error was certainly harmless."), cert. denied, 132 S. Ct. 538 (2011). The Eighth, Tenth, and D.C. Circuits appear not to have squarely addressed the issue. See *United States* v. *Nesgoda*, 559 F.3d 867, 869-870 & n.1 (8th Cir.) (requiring prejudice to prevail on postconviction review but reserving issue of standard applicable on direct appeal), cert. denied, 130 S. Ct. 169 (2009); *United States* v. *Cano-Varela*, 497 F.3d 1122, 1131-1134 (10th Cir. 2007) (finding prejudice but reserving question of what stan-

dard of review applies); *United States* v. *Baker*, 489 F.3d 366, 371-375 (D.C. Cir. 2007) (same).

Both the Sixth and Ninth Circuits have, like the Eleventh Circuit, granted appellate relief for a judicial-participation error without analyzing prejudice. See *United States* v. *Barrett*, 982 F.2d 193, 196 (6th Cir. 1992); *United States* v. *Anderson*, 993 F.2d 1435, 1438-1439 (9th Cir. 1993); but see *United States* v. *Thornton*, 609 F.3d 373, 379 (6th Cir.) (requiring showing of "actual prejudice" for judicial-participation error when defendant wound up going to trial rather than pleading guilty), cert. denied, 130 S. Ct. 3343 (2010). But even assuming those circuits would continue that practice following this Court's decisions in *Vonn* and *Dominguez Benitez*, the Eleventh Circuit's approach here would still be the minority rule.

2. In cases of judicial-participation error, whether or not the reviewing court analyzes prejudice can easily be outcome-determinative. Although some courts have expressed the view that judicial-participation errors are likely to be prejudicial, see, *e.g.*, *Bradley*, 455 F.3d at 463, courts have allowed pleas to stand in cases where individualized prejudice analysis cuts against the defendant. See, *e.g.*, *Pagan-Ortega*, 372 F.3d at 28 (finding district judge's comments that plea offer was a "good deal" and a "super break" not to be plain error); *Ebel*, 299 F.3d at 191-192 (finding district judge's announcement that he would go along with the non-binding recommended sentence if the defendant pleaded to be harmless error); see also *Nesgoda*, 559 F.3d at 869-870 (finding district judge's comments on proposed plea agreement not to be plain error).

This very case should come out differently under a prejudice analysis. Although the government has conceded that the magistrate judge's comments violated Rule 11(c)(1), the procedural history of this case demonstrates that those comments had no appreciable impact on respondent's decision to plead guilty. Respondent filed a motion demanding a speedy trial shortly after the magistrate made the comments; he never mentioned the comments when he asked the district court to set aside his plea, but instead explained that he had pleaded for "strategic" reasons; and he did not even think to argue judicial-participation error on appeal until the court, after an "independent review" of the record, specifically requested briefing on that subject. See pp. 4-8, *supra*.

Moreover, any effect the comments might have had was dissipated by the three-month interval between the comments and the plea and by the absence of the magistrate judge from the plea and sentencing proceedings (over which the district judge presided). Gov't C.A. Br. 3-6. Even the Eleventh Circuit appears to agree that the passage of time and a fresh judge are sufficient to cure judicial-participation error, as that is the appellate remedy it grants in cases where it finds such error. See App., *infra*, 5a. When a defendant, like respondent here, has already effectively received that remedy, an appellate-court order requiring further proceedings before yet another judge wastes resources and accomplishes nothing.

3. The circuit conflict will persist unless and until this Court intervenes. The Eleventh Circuit deems itself bound by *Adams* in the absence of an en banc decision overruling it. *Casallas*, 59 F.3d at 1177. And the court has now denied the government's petition for en

banc review. App., *infra*, 9a-10a. The court has thus adhered to its automatic-vacatur practice notwithstanding changes to Rule 11 and this Court's decisions in *Vonn* and *Dominguez Benitez*. Review by this Court is necessary to correct that erroneous practice.

C. The Question Presented Is Recurring And Important

Without this Court's intervention, the circuit conflict will continue to affect a substantial number of cases. Guilty pleas account for 97% of federal criminal convictions. *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). District courts presiding over such cases cannot stay completely removed from all matters touching upon plea discussions; those courts will sometimes run afoul of Rule 11(c)(1); and reviewing courts will have to address those Rule 11(c)(1) errors.

The magistrate judge in this case was forced to confront the issue of ongoing plea negotiations when respondent asked that his attorney be removed because he was overly focused on a guilty plea. See App., *infra*, 1a-2a. But even in the absence of such a motion, at least some degree of judicial inquiry into plea discussions is not only to be expected, but also encouraged, during the colloquy preceding the entry of a guilty plea. This Court has recently emphasized that plea-entry proceedings provide "the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea." *Frye*, 132 S. Ct. at 1406. Courts can "guard against" a later claim of ineffective assistance of counsel "by establishing * * * that the defendant has been

given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered." *Id.* at 1406-1407.

It is easy for a judge diligently attempting to assure that a defendant's constitutional rights were not violated in the plea-negotiation process to inadvertently "cross[] the line into the realm of participation" barred by Rule 11(c)(1). *Casallas*, 59 F.3d at 1178. That is especially true in the Eleventh Circuit, which has a particularly broad conception of Rule 11(c)(1) error. In the Eleventh Circuit's view, the rule "imposes 'an absolute prohibition on all forms of judicial participation in . . . the plea negotiation process.'" *United States* v. *Tobin*, 676 F.3d 1264, 1303 (2012) (quoting *Adams*, 634 F.2d at 835). The court has "made it clear that [it] will not engage in the exercise of determining the degree to which a district court discusses the subject of plea negotiations" in determining whether Rule 11(c)(1) error has occurred. *Id.* at 1306 (citing *Casallas*, 59 F.3d at 1178). Rather, the court applies a bright-line rule that "district courts should not offer any comments 'touching upon' this subject" for any reason. *Id.* at 1307 (quoting *United States* v. *Diaz*, 138 F.3d 1359, 1363 (11th Cir.), cert. denied, 525 U.S. 913 (1998)); see *id.* at 1306. Even though a Rule 11(c)(1) error may be "'motivated primarily by the concern that the defendant be thoroughly apprised of the situation that he faced,'" that "'concern, however well-intentioned,' will not excuse judicial participation." App., *infra*, 4a-5a (quoting *Casallas*, 59 F.3d at 1178) (brackets omitted).

The government has little, if any, way to prevent district courts from straying into commentary that may

violate Rule 11(c)(1). Indeed, in this case, the colloquy that crossed the line occurred in ex parte proceedings involving only respondent and his counsel. And the decision below—which vacated a plea entered in front of a different judge three months after the comments were made—suggests that little can be done to cure such violations after the fact, except to wait for an appeal and the inevitable remand for further proceedings. Indeed, the Eleventh Circuit has recently held that judicial comments in violation of Rule 11(c)(1) entitle a defendant to appellate relief even if the defendant never pleads guilty at all and can demonstrate no prejudice from the violation at his trial or sentencing. *Tobin*, 676 F.3d. at 1307-1308 (remanding for resentencing before a different judge in that circumstance). Particularly because the Eleventh Circuit requires no objection in the district court, but remands violations on appeal without requiring a showing of prejudice, defendants may reserve an objection until after sentencing and then strategically raise it for the first time on appeal. This Court should grant certiorari to reaffirm that Rule 11(h) put an end to that sort of "cost[ly]" automatic-remand practice. *Vonn*, 535 U.S. at 70.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

KATHRYN KENEALLY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

ERIC J. FEIGIN
Assistant to the Solicitor General

FRANK P. CIHLAR
S. ROBERT LYONS
GREGORY VICTOR DAVIS
DEBORAH K. SNYDER
Attorneys

AUGUST 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-15310; 11-10224

NON-ARGUMENT CALENDAR

D.C. DOCKET No. 1:09-cr-00060-JRH-WLB-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

Appeals from the United States District Court
for the Southern District of Georgia

Dec. 21, 2011

Before: TJOFLAT, PRYOR and KRAVITCH, Circuit Judges.

PER CURIAM:

Anthony Davila appeals following his conviction for conspiracy to defraud the United States by obtaining false tax refunds, 18 U.S.C. § 286.[1] During a February

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[1] Davila also purports to appeal the denial of a post-judgment motion for reconsideration, but, by failing to include any challenge to this ruling in his opening brief, he has abandoned this issue on appeal. *See United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003).

2010 hearing before a magistrate judge, Davila requested the discharge of his court-appointed attorney, expressing a concern that counsel had not discussed any pertinent strategies with him except to plead guilty. The magistrate judge responded that "there may not be viable defenses to these charges," and that pleading guilty sometimes was the best advice an attorney could provide his client. The magistrate judge proceeded to inform Davila that:

> The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance.

In May 2010, Davila entered a plea of guilty before the district court, and on November 15, 2010, the court sentenced him to 115 months' imprisonment.

On appeal, Davila argues that the magistrate judge's comments at the *in camera* hearing amounted to improper participation in his plea discussions, requiring that his conviction be vacated. Davila specifically asserts that the magistrate judge commented on the weight of the evidence against him and suggested that a plea would result in a sentence more favorable than the sentence he would receive if he stood trial and was found guilty. He also asserts that he was entitled to the vacatur of his conviction despite his failure to object to the magistrate judge's comments because there was "no

question" that the comments violated his substantial rights and undermined the integrity of the proceedings.

Where, as here, the defendant fails to object to an asserted Rule 11 violation before the district court, we review the alleged violation for plain error. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005). Under the plain error standard, the defendant ordinarily must show that: (1) error existed (2) the error was plain, and (3) it affected the defendant's substantial rights; and (4) it "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.*

The Federal Rules of Criminal Procedure provide that "an attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. *The court must not participate in these discussions.*" Fed. R. Crim. P. 11(c)(1) (emphasis added). Rule 11(c)(1) states a "bright line rule": it prohibits "the participation of the judge in plea negotiations under any circumstances . . . [and] admits of no exceptions." *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996) (quotation omitted). Thus, "[j]udicial participation *is plain error, and the defendant need not show actual prejudice.*" *United States v. Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993) (emphasis added). Notably, while other circuits recognize harmless error in the context of judicial participation, we do not. *See United States v. Casallas*, 59 F.3d 1173, 1177 n.8 (11th Cir. 1995).

Three rationales support the absolute ban on judicial participation: "(1) judicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty; (2) the prohibition protects

the integrity of the judicial process; and (3) the ban preserves the judge's impartiality after the negotiations are completed." *Johnson*, 89 F.3d at 782-83 (quotation omitted). Thus, prior to any agreement by the parties, "a court should not offer comments touching upon proposed or possible plea agreements," which go beyond a source of information to plea negotiators and amount to "indications of what the judge will accept" that "will quickly become the focal point of further discussions." *United States v. Diaz*, 138 F.3d 1359, 1363 (11th Cir. 1998) (quotations omitted).

When the district court contrasts the sentence a defendant would receive if he pled guilty with the sentence he would receive if he went to trial and was found guilty, judicial participation is presumed and the conviction must be set aside. *See Casallas*, 59 F.3d at 1177 (holding that a court's comments contrasting the likely minimum sentence he would receive if he pled with the minimum sentence he would receive if he went to trial, and suggesting that the defendant "talk to his lawyer and see if [a trial] is really what he wants to do" operated to coerce the plea in violation of Rule 11(c)(1)). Similarly, a court may not comment on the "weight and nature of the evidence against" a defendant. *Diaz*, 138 F.3d at 1361-63 (holding that the district court violated Rule 11 by participating in plea discussions, in part, due to its comments that the evidence against the defendant was "kind of compelling," but declining to vacate the conviction because the defendant proceeded to trial nonetheless).

As a bright line rule, we usually refrain from inquiring into the degree of judicial participation. *Casallas*, 59 F.3d at 1178. Furthermore, while a court may be "moti-

vated primarily by the concern that [the defendant] be thoroughly apprised of the situation that he faced, . . . this concern, however well-intentioned," will not excuse judicial participation. *Id.* When a Rule 11(c)(1) violation requires remand, "the case should be reassigned to another judge even if there is no evidence that the judge is vindictive or biased, as the means to extend the prophylactic scheme established by Rule 11 and to prevent the possible mis-impression created by the judge's participation." *Corbitt*, 996 F.2d at 1135.

We agree with Davila that the magistrate judge's comments at the *in camera* hearing amounted to judicial participation in plea discussions, and the record reflects that he pled guilty after these comments were made. Under our binding precedent, Davila need not show any individualized prejudice. Accordingly, we vacate Davila's conviction and remand for the case with the instruction that Davila's not guilty plea be reinstated and that the Chief Judge of the District Court reassign the case to another district judge with the instruction that the magistrate judge who handled Davila's case is disqualified.

VACATED and REMANDED, with instructions.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-15310-II; 11-10224-II

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Georgia

[Filed: July 11, 2011]

ORDER

Michael N. Loebl, appointed counsel for Anthony Davila in this direct criminal appeal, has moved to withdraw from further representation of Davila, because, in his opinion, the appeal is without merit. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), arguing that there are no issues of arguable merit to be raised on Davila's behalf. Davila has responded in opposition to counsel's *Anders* motion.

An attorney who finds an appeal "wholly frivolous" and seeks to withdraw from further representation nev-

ertheless must remain in the role of an active advocate on behalf of the client. *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400. Thus, counsel seeking to withdraw from further representation based upon the belief that an appeal is wholly frivolous must accompany the motion to withdraw with a brief that "set[s] out *any* irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious." *United States v. Blackwell*, 767 F.2d 1486, 1487-88 (11th Cir. 1985) (emphasis in original).

Counsel must conduct "a conscientious examination" of the entire record on appeal. *Penson v. Ohio*, 488 U.S. 75, 80, 109 S. Ct. 346, 350, 102 L. Ed. 2d 300 (1988) (quotation omitted). Counsel then must isolate the pages of the record relevant to those arguably meritorious points and cite relevant legal authority. *See United States v. Edwards*, 822 F.2d 1012, 1013 (11th Cir. 1987). After plenary review of the record, the appeals court must independently determine whether the case is wholly frivolous. *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400.

Although counsel's brief discusses multiple potential issues that Davila could appeal and argues that none of these issues have arguable merit, independent review has revealed an irregularity in the statements of a magistrate judge, made during a hearing prior to Davila's plea, which appeared to urge Davila to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences. Counsel does not address, however, whether this irregularity constituted an issue of arguable merit or express an opinion as to whether judicial participation occurred. *See, e.g., United States*

v. *Johnson*, 89 F.3d 778, 783 (11th Cir. 1996) (remarking that Fed. R. Crim. P. 11(c)(1) is a "bright line rule" that prohibits "the participation of the judge in plea negotiations under any circumstances . . . [and] admits of no exceptions") (quotation omitted); *United States v. Casallas*, 59 F.3d 1173, 1177 (11th Cir. 1995) (holding that reversible judicial participation occurred where the district court contrasted the likely sentence a defendant would received if he pled guilty with the likely sentence he would receive if he proceeded to trial). We remind counsel that, pursuant to his obligation under *Anders*, he is required to address "any irregularity" in the proceedings. *See Blackwell*, 767 F.2d at 1487.

Accordingly, counsel's motion to withdraw is **DENIED WITHOUT PREJUDICE**. Counsel may renew his motion under *Anders* or, alternatively, file a merits brief that challenges the magistrate's pre-plea statements under Rule 11(c)(1), or raises any other issue that he deems to have arguable merit. Should counsel elect to renew his *Anders* motion, he is hereby **DIRECTED** to address the arguable merit, for legal or strategic reasons, of an appellate challenge to the knowing and voluntary nature of Davila's guilty plea notwithstanding the magistrate's statements to him.

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-15310-DD; 11-10224-DD

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Georgia

[Apr. 6, 2012]

ON PETITION(S) FOR REHEARING
AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, PRYOR and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-167

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY DAVILA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

J. Pete Theodocion
J. PETE THEODOCION, P.C.
507 Walker Street
Augusta, GA 30901
(706) 993-1171

E. Joshua Rosenkranz
Counsel of Record
Robert M. Yablon
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Respondent

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QUESTION PRESENTED

Whether the Court of Appeals correctly set aside the guilty plea of a defendant who had been pressured to plead guilty by a magistrate judge acting in clear violation of Federal Rule of Criminal Procedure 11(c)(1), which prohibits courts from participating in plea discussions.

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STATEMENT

In May 2009, a federal grand jury returned a 34-count indictment charging respondent Anthony Davila with conspiracy to defraud the federal government, mail fraud, aggravated identity theft, and making false claims to the IRS. 09-cr-60 Docket Entry No. 1 (S.D. Ga. May 7, 2009). The indictment alleged that Mr. Davila had participated in a scheme to file false income tax returns in other people's names in order to collect improper refunds. Mr. Davila appeared before a magistrate judge in the Southern District of Georgia, received court-appointed counsel, and entered a plea of not guilty.

The government soon made a plea offer, which appointed counsel delivered to Mr. Davila in jail in July 2009. Counsel returned six weeks later to discuss the agreement but found that Mr. Davila, who suffers from schizoaffective disorder, was unable to review it. Counsel requested a competency examination and hearing. Docket Entry No. 35 (Aug. 21, 2009).

Before the competency hearing was held, Mr. Davila sent a letter to the court requesting new counsel. His appointed counsel, he wrote, had not adequately consulted with him, had failed to conduct an adequate investigation, had never "mentioned ... any possible defenses," and had instead merely urged Mr. Davila "to plead guilty." C.A. E.R. Ex. B.

In response, the magistrate judge convened an ex parte hearing in February 2010 to discuss the letter with Mr. Davila and his attorney. The judge

made clear from the start that he had no intention of appointing new counsel. He told Mr. Davila that his attorney had once served as the judge's law clerk and "was one of the finest ... [the judge] ever had," and that Mr. Davila had been "lucky in the [appointed counsel] draw." Docket Entry No. 127, at 3-4 (filed Jan. 18, 2011) (Ex Parte Hearing Tr.). Addressing Mr. Davila's concern that his attorney was advising him that he "ought to plead guilty," the magistrate judge told Mr. Davila that "oftentimes ... that is the best advice a lawyer can give his client" and that "there may not be a viable defense to these charges." *Id.* at 8, 11. The judge continued:

> In view of whatever the Government's evidence in a case might be, it might be a good idea for the Defendant to accept responsibility for his criminal conduct to plead guilty and go to sentencing with the best arguments on your behalf still available for not wasting the Court's time, not causing the Government to have to spend a bunch of money empanelling a jury to try an open-and-shut case.

Id. at 8-9. Mr. Davila responded that he was concerned that his attorney was trying to get him to "sign an agreement without giving me my options." *Id.* at 10.

The magistrate judge then told Mr. Davila that he should

> try to understand [that] the Government ... ha[s] all of the marbles in this situation....

> The only thing at your disposal that is entirely up to you is the two- or three-level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance.

Id. at 15-16.

The judge stated that he didn't know what guidelines range Mr. Davila faced but that it would "probably [be] pretty bad because your criminal history score would be so high." *Id.* at 16. The court advised that, in addition to accepting responsibility, Mr. Davila should also figure out a way to "cooperate with the Government" and try to earn their recommendation for a downward departure. *Id.* at 16. The court concluded by once again urging Mr. Davila

> to come to the cross....You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so

> give him the two-level, give him the three-level reduction.

Id. at 17.

Several weeks later, the magistrate judge conducted a competency hearing and issued a report and recommendation finding Mr. Davila competent to stand trial. The district court accepted the report and recommendation in late March 2010. Docket Entry No. 52 (Mar. 23, 2010).

Shortly thereafter, on May 11, 2010, Mr. Davila signed a plea deal in which he agreed to plead guilty to conspiracy in exchange for dismissal of the remaining charges. Docket Entry No. 62. The district court convened a change-of-plea hearing six days later. At the hearing, Mr. Davila contested part of the government's factual basis for the conspiracy count, insisting that government had overstated the conspiracy's scope. But he ultimately admitted the elements of the charge, and the district court accepted his plea. Docket Entry No. 121 (filed Jan. 11, 2011) (Plea Hearing Tr.).

Prior to sentencing, Mr. Davila filed a pro se motion seeking to terminate his appointed counsel. Docket Entry Nos. 67, 70 (July 27, 2010; Aug. 4, 2010). Following two hearings on the matter, the magistrate judge ultimately agreed to allow Mr. Davila to proceed pro se, with his appointed counsel serving as stand-by counsel. Mr. Davila then moved to vacate his plea, contending that the government, both in the indictment and at the change-of-plea hearing, had knowingly overstated the scope of the

charged conspiracy and that his attorney had acted improperly by encouraging him to plead guilty despite those factual inaccuracies. Docket Entry No. 79 (Sept. 15, 2010).

The district court denied Mr. Davila's motion from the bench at the start of his November 2010 sentencing hearing. The court proceeded to reject Mr. Davila's objections to the presentence investigative report and sentenced Mr. Davila to 115 months' imprisonment—the top of the applicable guidelines range and just under the 120-month statutory maximum. Docket Entry No. 122, at 41 (filed Jan. 11, 2011) (Sentencing Tr.).

Mr. Davila promptly filed a pro se notice of appeal. The Court of Appeals assigned his trial counsel—the same attorney Mr. Davila had previously terminated—to represent him. Mr. Davila filed a motion for new counsel, and trial counsel filed a motion to withdraw, noting that Mr. Davila had accused him of misconduct and filed a bar complaint against him. 10-15310 Docket Entries (11th Cir. Dec. 20, 2010; Jan. 28, 2011). The court denied both motions. 10-15310 Docket Entry (11th Cir. Feb. 3, 2011). Counsel then filed a brief stating that Mr. Davila had no nonfrivolous basis for appeal and moved to withdraw pursuant to *Anders v. California*, 367 U.S. 738 (2011).

The Court of Appeals denied counsel's *Anders* motion. During its "independent review" of the record, the court had come upon the statements of the magistrate judge at the February 2010 ex parte hearing, which "appeared to urge Davila to cooperate

and be candid about his criminal conduct to obtain favorable sentencing consequences." Pet. App. 7a. Counsel's *Anders* brief, the court noted, had failed to address "whether this irregularity constituted an issue of arguable merit or express an opinion as to whether judicial participation occurred." *Id.* The court instructed counsel either to "file a merits brief that challenges the magistrate's pre-plea statements under [Federal Rule of Criminal Procedure] 11(c)(1)," which prohibits courts from "participat[ing] in [plea] discussions," or to file a renewed *Anders* motion explaining why such a challenge would not have arguable merit. *Id.* at 8a.

Mr. Davila's counsel proceeded to file a brief urging the appellate court to vacate Mr. Davila's conviction on the ground that the magistrate judge had improperly participated in plea negotiations in violation of Rule 11(c)(1). 10-15310 Docket Entry (11th Cir. Aug. 19, 2011). In response, the government conceded that the magistrate judge's comments "amounted to error, and the error was plain." 10-15310 Docket Entry at 14 (11th Cir. Sept. 29, 2011). The government insisted, however, that the comments did not affect Mr. Davila's substantial rights because there was "no evidence" that they "affected Davila's decision to plead guilty." *Id.* at 15.

The Court of Appeals issued a short per curiam opinion rejecting the government's position. Pet. App. 1a-5a. Because Mr. Davila had failed to object to the magistrate judge's comments, the court reviewed the "asserted Rule 11 violation ... for plain error." *Id.* at 3a. Rule 11(c)(1), the court observed, speaks in categorical terms, "prohibit[ing] 'the par-

ticipation of the judge in plea negotiations under any circumstances.'" *Id.* (quoting *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996)). The court identified "[t]hree rationales" that underlie the prohibition: "'(1) judicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty; (2) the prohibition protects the integrity of the judicial process; and (3) the ban preserves the judge's impartiality after the negotiations are completed.'" Pet. App. 3a-4a (quoting *Johnson*, 89 F.3d at 782-83). Consistent with these rationales, the court noted that "judicial participation is presumed" when a judge "comment[s] on the 'weight and nature of the evidence against' a defendant" or "contrasts the sentence a defendant would receive if he pled guilty with the sentence he would receive if he went to trial and was found guilty." Pet. App. 4a (quoting *United States v. Diaz*, 138 F.3d 1359, 1363 (11th Cir. 1998)). Agreeing with Mr. Davila and the government that the magistrate judge's comments "amounted to judicial participation in plea discussions" in violation of Rule 11(c)(1), the court found it unnecessary for Mr. Davila to make any further showing of "individualized prejudice" in order to obtain relief. Pet. App. 5a. The court vacated Mr. Davila's conviction and remanded for further proceedings.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SQUARE CONFLICT IN THE LOWER COURTS THAT WARRANTS THIS COURT'S REVIEW

According to the petition, the Eleventh Circuit has split from the majority of its sister circuits by adopting an "inflexible" rule of automatic vacatur "following any degree of judicial participation in plea negotiations, regardless of whether the defendant was prejudiced." Pet. 9. In reality, there is no stark division among the circuits. The Eleventh Circuit's approach is less categorical and more nuanced than the petition suggests, and the Courts of Appeals have reached similar conclusions when confronted with similar facts. Any divergence among the circuits is principally semantic, not substantive, and thus does not warrant this Court's review.

A. The Eleventh Circuit Takes Account Of Prejudice When Analyzing Rule 11 Judicial Participation Claims

The petition is incorrect that the Eleventh Circuit "grant[s] appellate relief for a judicial participation error without analyzing prejudice." Pet. 18. The court does conduct a "prejudice analysis"; it simply performs it under a different heading than the petition envisions. Rather than assessing prejudice *after* identifying a judicial participation violation, the court typically considers prejudice earlier, as part of its inquiry into whether there has been a violation in the first place.

In this case, the Court of Appeals began by embracing the government's preferred standard of review. Claims of improper judicial participation in plea negotiations, the court held, are reviewable only for "plain error" when "the defendant fails to object ... before the district court." Pet. App. 3a. The decision below sets out the usual four-part plain-error standard, which requires (1) error, (2) that is plain, (3) that affects the defendant's substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of the proceedings. *Id.*

Addressing the question of error, the Court of Appeals described the prohibition on judicial participation as "absolute" and noted that the court "usually refrain[s] from inquiring into the degree of judicial participation." *Id.* at 3a-4a. But the court did not hold that every comment "touching upon proposed or possible plea agreements," no matter how inconsequential, runs afoul of Rule 11(c)(1). *Id.* at 4a (internal quotation marks omitted). To the contrary, the court indicated that a judge's involvement "amount[s] to judicial participation" within the meaning of the Rule and falls within the Rule's "absolute ban" only when the judge places a thumb on the scale. *Id.* at 3a, 5a. Under the court's analysis, if "the court's statements [cannot] be read as coercive," then there is "no violation of Rule 11." *Johnson*, 89 F.3d at 783-84.[1]

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[1] *See also United States v. Burnside*, 588 F.3d 511, 520 (7th Cir. 2009) (stating that "'Rule 11(c)(1) categorically prohibits the court from participating in plea negotiations,'" but also noting that "not all judicial observations expressed with respect to plea agreements violate the rule" (citation omitted));

Thus, to constitute forbidden participation, a judge's remarks typically must "go beyond [being] a source of information to plea negotiators." Pet. App. 4a. The court has held, for instance, that a violation of Rule 11(c)(1) may arise when, "prior to any agreement by the parties," the court makes comments that "amount to 'indications of what the judge will accept' that 'will quickly become the focal point of further discussions.'" Pet. App. 4a (quoting *Diaz*, 138 F.3d at 1363). Likewise, "judicial participation is presumed" when the district court comments on the strength of the evidence against the defendant in an effort to induce a guilty plea or "contrasts the sentence a defendant would receive if he pled guilty with the sentence he would receive if he went to trial." Pet. App. 4a. In contrast, a district court does not "improperly intermeddle[] in ... plea negotiations" when, at the request of defense counsel, it discusses the sentencing consequences of a plea agreement that the defendant has already executed. *United States v. Telemaque*, 244 F.3d 1247, 1248-49 (11th Cir. 2001) (per curiam). In other words, consistent with the underlying purposes of the Rule, what is prohibited is conduct that "'inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty'" and that threatens "'the integrity of the judicial process.'" Pet. App. 3a-4a (quoting *Johnson*, 89 F.3d at 783); *see also United States v. Corbitt*,

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United States v. Cano-Varela, 497 F.3d 1122, 1132 (10th Cir. 2007) (while "'Rule 11 prohibits the participation of the judge in plea negotiations under *any* circumstances,'" "[n]ot all judicial comments relating to plea agreements violate the rule" (citation omitted)).

996 F.2d 1132, 1135 (11th Cir. 1993) (noting that the purpose of Rule 11 is to "eliminate judicial pressure from the plea bargaining process").

Accordingly, once the Court of Appeals assesses the specific content and context of a judge's comments and determines that they clearly "amount[] to judicial participation" in v[illegible]ation of Rule 11(c)(1), the court has insight into all four parts of the plain-error standard, at least where the defendant has surrendered his trial rights and pled guilty. The court knows not only that there has been error and that the error is plain (the first and second requirements), but also that the error affected the substantial rights of the defendant and the integrity of the proceedings (the third and fourth requirements). A judge's remarks amount to "judicial participation" precisely because they alter a defendant's plea calculus and subvert the court's status as an impartial referee. The error and the prejudice are essentially one and the same.

That is all the Court of Appeals meant when it said that a defendant who establishes improper judicial participation in plea negotiations "need not show any individualized prejudice." Pet. App. 5a. The court has never described judicial participation errors as "structural" or declared that they are not subject to Rule 11(h), and it has never suggested that a defendant's plea must be vacated whenever a district court happens to make a stray plea-related comment. The court's offhand remark in the decision below that it does not "recognize harmless error in the context of judicial participation" (Pet. App. 3a) simply reflects the reality that a defendant who

pleads guilty after a district court engages in conduct that amounts to a violation of Rule 11(c)(1) has experienced harm that warrants relief. If the court concludes that the district court's comments did not pressure the defendant to plead guilty, no violation has occurred and no relief is provided. *See, e.g., Johnson*, 89 F.3d at 784 ("find[ing] no violation of Rule 11" where there was "nothing coercive in the manner in which the court conducted the plea hearing"); *United States v. Casallas*, 59 F.3d 1173, 1179 (11th Cir. 1995) (holding that improper comments at a hearing where the defendant pled guilty to one charge did not require the court to vacate the defendant's later pleas to separate charges because there was no indication that the earlier comments had "infect[ed] or taint[ed] the guilty pleas at the [later] hearing").

The Eleventh Circuit's handling of judicial participation claims brought by defendants who went to trial instead of pleading guilty further demonstrates that the court has not embraced a policy of automatic vacatur even when prejudice is lacking. On several occasions, the court has declined to provide a remedy where a judge urged a defendant to plead guilty, but the defendant rejected that advice and was convicted after a jury trial. In *Diaz*, the court determined that the district court's improper participation in plea negotiations "did not prejudice" the defendant or "raise the specter of an involuntary plea." *Diaz*, 138 F.3d at 1363; *see also id.* (describing the defendant's "claim of prejudice [as] baseless"). The defendant, the court noted, did not contend that his trial had been unfair or that his sentence penalized him for exercising his trial rights. Finding no

indication that the trial outcome or "sentence would [have] be[en] different if determined by another judge," the court saw no need to vacate the conviction or remand for resentencing. *Id.* at 1364.

The Eleventh Circuit recently addressed a similar post-trial judicial participation claim in *United States v. Tobin*, 676 F.3d 1264 (11th Cir. 2012), a decision that postdates the decision below. As in *Diaz*, the court declined to vacate the defendants' convictions because the defendants "ha[d] not carried [their] burden of showing that [they were] actually prejudiced at trial." *Id.* at 1307. The court concluded, however, that one of the defendants, who had challenged his sentence on several grounds, should be resentenced before a different judge. The court distinguished *Diaz* on the ground that it had been decided at a time when district courts were still "constrained by [mandatory] sentencing guidelines." *Id.* at 1308. Now that "significant discretion has been restored to district courts in matters of sentencing," the court was "no longer confident ... that a district court's participation in plea discussions will not affect the court's actual impartiality or the appearance of impartiality at sentencing, both of which are fundamental to the integrity of that process." *Id.* But the court did *not* hold that resentencing is the required remedy for all acts of improper participation, even when prejudice is absent. Significantly, the court declined to vacate the sentences of two co-defendants who had made the same Rule 11 claim as the first defendant but who "ha[d] not challenged

their sentences in any way." *Id.* at 1308 n.27.[2] Because their sentences appeared to have been untainted by the asserted Rule 11(c)(1) violation, the Court of Appeals let them stand. Its ruling confirms that vacatur is by no means automatic.

B. Judicial Participation Rulings Are Largely Consistent Across The Circuits

The petition asserts that at least five circuits (the First, Third, Fourth, Fifth, and Seventh) have broken with the Eleventh and "inquired into prejudice as a prerequisite to vacating a guilty plea on grounds of judicial participation in plea negotiations," while two others (the Sixth and Ninth) have sided with the Eleventh and "granted appellate relief for a judicial-participation error without analyzing prejudice." Pet. 16, 18. In reality, there is no deep divide among the circuits in their handling of judicial participation claims. While the Courts of Appeals may differ modestly in their framing of the Rule 11(c)(1) inquiry, they "have established a familiar and generally uniform standard," and they grant and deny relief in similar circumstances. *United States v. Baker*, 489 F.3d 366, 370 (D.C. Cir. 2007).

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[2] To the extent the government objects to *Tobin*'s formulation of the standard for vacating the sentences of defendants who proceed to trial after a Rule 11(c)(1) violation, *see* Pet. 22, its proper recourse would have been to seek certiorari in that case—something it declined to do. This case concerns a defendant who pled guilty after improper judicial participation in plea negotiations, *not* a defendant who declined to plead and was convicted by a jury.

Consider the position of the Fifth Circuit. According to the petition, that court's decision in *United States v. Miles*, 10 F.3d 1135 (5th Cir. 1993), "puts the circuit conflict in particularly stark relief." Pet. 17. True, *Miles* states that judicial participation errors are subject to "harmless error review." 10 F.3d at 1141. But *Miles* also states that, as a practical matter, Rule 11(c)(1) violations are extremely unlikely to be harmless. In the court's words, "the pressure inherent in judicial participation would seem to be reason enough to reverse a conviction when the defendant accedes to the plea suggested by the district court." *Id.* at 1141. In support of this proposition, the Fifth Circuit relied on a Sixth Circuit decision that the petition places on the other side of the alleged split. *Id.* (discussing *United States v. Barrett*, 982 F.2d 193 (6th Cir. 1992)); *see also United States v. Rodriguez*, 197 F.3d 156, 160 (5th Cir. 1999) (reiterating that "it is difficult to imagine a situation in which the court would find a judge's participation in the plea negotiation process to be harmless given the inherent pressure placed on the defendant").

The Fourth and Seventh Circuits have likewise declared that, "insofar as judicial intervention in the negotiation of a plea agreement is concerned, the possibility of harmless error may be more theoretical than real." *United States v. Kraus*, 137 F.3d 447, 457 (7th Cir. 1998); *see also United States v. Bradley*, 455 F.3d 453, 463 (4th Cir. 2006) (recognizing that "it will be rare that a clear violation of Rule 11's prohibition against judicial involvement in plea negotiations does not affect substantial rights"). Concluding in *Kraus* that the plea-related remarks of a district judge's clerk were not harmless, the Seventh Circuit

explained that there are "pressures ... inherent in judicial intervention." *Kraus*, 137 F.3d at 457. When a court indicates what sort of deal it prefers, it "inevitably affect[s] the parties' own efforts to craft an agreement acceptable to them." *Id.* Along similar lines, the Fourth Circuit held in *Bradley* that, by "repeatedly encouraging [the defendants] to plead guilty," the district court committed "plain Rule 11 error [that] affected [the defendants'] substantial rights," entitling them to withdraw their pleas. 455 F.3d at 455, 464. In both cases, the Fourth and Seventh Circuits relied in part on decisions from the Sixth, Ninth, and Eleventh Circuits that purportedly stand on the other side of the circuit conflict. *See, e.g.*, *id.* at 460 (endorsing the Sixth Circuit's statement in *Barrett*, 982 F.2d at 194, that "'a judge's participation in plea negotiation is inherently coercive'"); *see also United States v. Cano-Varela*, 497 F.3d 1122, 1133 (10th Cir. 2007) ("We agree with the Fourth and Fifth Circuits that errors such as these 'almost inevitably seriously affect the fairness and integrity of judicial proceedings' and affect substantial rights as required to prove plain error.").

The petition cites only two cases in which courts actually declined to vacate guilty pleas on the ground that an asserted judicial participation error was non-prejudicial—*United States v. Pagan-Ortega*, 372 F.3d 22 (1st Cir. 2004), and *United States v. Ebel*, 299 F.3d 187 (3d Cir. 2002). Both cases are factually distinguishable from the present case, and both likely would have come out the same way in the Eleventh Circuit as they did in the First and Third. In *Pagan-Ortega*, the district court told the defendant he had gotten a "good deal" *after* the "plea

agreement had been reached" and its terms confirmed. 372 F.3d at 25-26. The First Circuit "assume[d]" that this was error and, without saying anything about whether it had affected the defendant's substantial rights, concluded that it did not affect the integrity of the proceedings. *Id.* at 27. The Eleventh Circuit has held that such "*post*-agreement remark[s]" do not amount to improper intervention under Rule 11. *Telemaque*, 244 F.3d at 1249. Thus, rather than resorting to the fourth prong of the plain-error standard (effect on the integrity of the proceedings), the Eleventh Circuit simply would have rejected the claim under the first prong for lack of error. *Cf. Cano-Varela*, 497 F.3d at 1132 ("This position [that post-agreement remarks do not violate Rule 11(c)(1)] appears to be uniform among the Courts of Appeals.").

In *Ebel*, the Third Circuit confronted a situation in which, before any improper judicial participation, the defendant unequivocally expressed a desire to plead guilty in exchange for a 36-month sentence. The court's comments induced the defendant to accept a plea deal that the parties mistakenly believed would result in a guidelines range of 37–46 months. In fact, the guidelines range was lower, and the defendant ended up with a 33-month sentence. The Third Circuit did not question the prevailing view that judicial participation in plea negotiations is "inherently coercive," but the court concluded that the defendant "was induced to do nothing beyond what he had already stated he would agree to." 299 F.3d at 191-92. Had the Eleventh Circuit been presented with these unusual facts, it likely would have held either that there had been no improper participation

because the judge's comments were not made until after the defendant declared his willingness to plead or that the participation did not warrant relief because the defendant did better than his hoped-for bargain.

On the Eleventh Circuit's side of the alleged split, the petition places the Sixth and Ninth Circuits. These courts, however, do not apply an automatic vacatur rule to provide relief even where prejudice is absent. In *Barrett*, the Sixth Circuit emphasized the prejudicial effect of the district court's actions. According to the Sixth Circuit, the district court's comments on various sentencing options and on the strength of the government's case were "coercive" and left the defendant "with the choice of pleading guilty or taking his chances at trial in front of a judge who seemed already to have made up his mind about the defendant's guilt." 982 F.2d at 195. Because the district court had placed "pressure" on the defendant to plead guilty, the Sixth Circuit explained that its conduct could not be considered "harmless error under [Rule] 11(h)," as the government contended. *Id.* at 196. For its part, the Ninth Circuit has denied relief where the district court "was not trying to shape the agreement or persuade either side to accept it," and it has emphasized that Rule 11 "does not establish a series of traps for imperfectly articulated oral remarks." *United States v. Frank*, 36 F.3d 898, 902-03 (9th Cir. 1994); *compare Anderson v. United States*, 993 F.2d 1435, 1438-39 (9th Cir. 1993) (vacating plea where the district court's plea-related comments "effectively threw the weight of the court behind the prosecution," creating a "coercive atmosphere" in which it was "difficult to

imagine how [the defendant] could not have felt pressured"). Neither the Sixth Circuit nor the Ninth has ever declared that prejudice analysis is categorically inapplicable to judicial participation violations.

In short, any split is illusory. The circuits all consider judicial participation claims in their specific contexts, and they are largely consistent in their handling of factually similar claims. When a judge's plea-related comments appear prejudicial, the circuits generally grant relief. When a judge's comments appear non-prejudicial, the circuits generally deny relief, usually on the ground that the comments do not amount to a violation of Rule 11's prohibition on judicial participation and occasionally on the ground that any violation was harmless. The petition identifies no instance in which a circuit has reached a result contrary to the Eleventh Circuit in a case, like this one, in which a judicial officer implored a defendant who had just signaled a desire to exercise his trial rights to "come to the cross" and plead guilty in order to reduce his sentencing exposure. Whatever modest semantic differences may exist among the circuits simply do not justify this Court's review.

II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Beyond the absence of any true circuit conflict, several vehicle problems counsel against a grant of certiorari.

A. Respondent Would Prevail Even Under The Government's Preferred Approach To Judicial Participation Errors

This is not a case in which the government's proposed standard would be outcome determinative. The judicial participation at issue here falls within the heartland of the Rule 11(c)(1) prohibition, and the prejudice is palpable. Indeed, few reported judicial participation cases involve a violation as egregious as this one. However well intentioned the magistrate judge may have been, his comments sent an unmistakable message to Mr. Davila to give up his trial rights and plead guilty. The judge suggested that Mr. Davila lacked a "viable defense" and should not "wast[e] the Court's time" by requiring the government "to spend a bunch of money empanelling a jury to try an open-and-shut case." Ex Parte Hearing Tr. at 8, 11. The judge told Mr. Davila that he "need[ed]" credit for acceptance of responsibility because his guidelines range would likely be "pretty bad." *Id.* at 16. And the judge twice implored Mr. Davila to come "to the cross" and try to earn a downward departure. *Id.* at 16-17.

Appellate courts—including those courts that the government says properly inquire into prejudice—have consistently held that remarks such as these are "'inherently coercive'" and "taint[] everything that follow[s]." *Cano-Varela*, 497 F.3d at 1133-34 (citation omitted); *see also id.* at 1133 (noting that "the Courts of Appeals all appear to" agree on this point). The Courts of Appeals have granted relief not only in cases closely analogous to this one, but also in cases in which the judicial pressure was less

overt than it was here. *See, e.g.*, *Bradley*, 455 F.3d at 462 (court "commented on the amount and weight of the Government's evidence" and encouraged defendants to plead guilty); *Rodriguez*, 197 F.3d at 159 (court second-guessed defendant's desire to go to trial and encouraged him to plead guilty); *Kraus*, 137 F.3d at 456-57 (judicial clerk advised parties about what sentence would be acceptable in plea agreement); *United States v. Daigle*, 63 F.3d 346, 349 (5th Cir. 1995) (court advised defendant of sentence he would receive if he pled guilty); *Miles*, 10 F.3d at 1141 (court told the parties how long a sentence their agreement should provide). These decisions recognize that, when a judicial official advises a defendant to take a particular course of action and suggests that a failure to do so will have negative repercussions, the "substantial rights" of the defendant are "obviously affected." *Cano-Varela*, 497 F.3d at 1134. It is simply "difficult to imagine" that such judicial pressure would not influence a defendant's plea calculus. *Rodriguez*, 197 F.3d at 160. The circumstances of the Rule 11(c)(1) violation in this case are thus "reason enough" to conclude that Mr. Davila has suffered prejudice and is entitled to relief. *Miles*, 10 F.3d at 1141; *see also Rodriguez*, 197 F.3d at 160 ("[W]e must conclude that the coercion that results from judicial participation so corrodes the plea bargaining process that no amount of corrective procedures may neutralize it.").

Even assuming that a further inquiry into the proceedings below could conceivably alter this conclusion, the petition is simply incorrect that "the procedural history of this case" suggests a lack of prejudice. Pet. 19. The petition speculates, for in-

stance, that "any effect the [magistrate judge's] comments might have had was dissipated by the three-month interval between the comments and the plea" and by the fact that the judge did not preside over Mr. Davila's plea colloquy and sentence. Pet. 19. But the three-month delay occurred in large part because the parties needed to await a determination of Mr. Davila's mental competency before entering into a plea agreement and because Mr. Davila had only limited access to his attorney. As for the magistrate judge's absence from the later proceedings, his lack of direct involvement did nothing to diminish the weight of his words, particularly since the district court never acknowledged or distanced itself from the offending remarks. The petition also suggests that the failure of Mr. Davila and his attorney to complain about the comments indicates that they had no influence. Courts, however, have rejected arguments along these lines, and they are especially misplaced here given that Mr. Davila went into the ex parte hearing seemingly unwilling to plead guilty and has repeatedly expressed dissatisfaction with the plea agreement. *See, e.g.*, *Bradley*, 455 F.3d at 463 ("[T]he failure of defense counsel to recognize and to seek to avoid the Rule 11 error at trial, while unfortunate, does not provide a basis for finding that the error did not affect Defendants' substantial rights.").

The bottom line is that this case presents a classic example of prejudicial judicial participation in plea negotiations. Whatever objections the government might have to the Court of Appeals' articulation of the prejudice inquiry, this is emphatically not the sort of situation in which a defendant's guilty

plea should be allowed to stand. This Court should wait for a case in which the parties' dispute over the legal standard is not merely academic.

B. The Circumstances Of This Case Do Not Implicate The Government's Core Concerns

Along similar lines, the Court should deny certiorari because this case does not involve any of the problematic scenarios that the government associates with the "automatic-vacatur approach" that the Court of Appeals supposedly embraced in the decision below. Pet. 14. The government expresses concern, for example, that an "automatic-vacatur" rule will allow defendants to obtain relief even where "the judge's comments merely expressed what was already obvious to the negotiating parties, were entirely neutral, or even discouraged the defendant from pleading." Pet. 14. Elsewhere, the government worries that, during the course of a plea colloquy, "a judge diligently attempting to assure that a defendant's constitutional rights were not violated in the plea-negotiation process" might inadvertently "stray[]" into prohibited commentary and thus invalidate the plea. Pet. 21. The government also speculates that defendants may attempt to game the system by "strategically rais[ing]" judicial participation errors on appeal if they are dissatisfied with their sentences. Pet. 22.

Putting aside for the moment that all of these concerns rest on a questionable reading of the decision below, the fact is that this case does not implicate a single one of them. The judicial comments at

issue here were not neutral and certainly did not discourage Mr. Davila from pleading guilty. The magistrate judge did not make his remarks during the course of a plea colloquy in which he was attempting to ensure that a guilty plea was knowing and voluntary. And this is not a case in which anyone delayed in identifying the judicial participation error in order to gain a strategic advantage. As the government points out, it was the Court of Appeals itself that identified the plainly erroneous comments when it reviewed the record after Mr. Davila's counsel filed his *Anders* motion. Pet. 19.

A far better vehicle than this case would be one in which an appellate court actually vacates a conviction even though the district court did not encourage a plea, or the court's offending comment was merely a stray remark during a plea colloquy, or the defendant intentionally withheld objection. If the government's concerns are well-founded, it should not have to wait long for such a case. If such a case does not arise, that will serve as strong evidence that the government's concerns are misplaced and that this Court's review is unwarranted.

C. This Case Raises A Difficult Preliminary Question Concerning The Appropriate Standard Of Review

The government contends that, consistent with this Court's precedents, an appellate court cannot grant relief on an unpreserved judicial participation claim unless the defendant satisfies the plain-error standard by, among other things, making a specific showing of prejudice. *See* Pet. 11. The government's

argument presupposes that such claims are, in fact, subject to plain-error review. If they are not, then any inquiry into prejudice would occur under the more forgiving harmless-error standard, under which the government would bear the "burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993).

It is by no means obvious that judicial participation claims not raised in the district court should be reviewable only for plain error. This Court's decisions, the D.C. Circuit has observed, "do[] not suggest that [plain-error review] applies to all Rule 11 violations raised for the first time on appeal." *Baker*, 489 F.3d at 372. Several appellate courts have recognized that the "unique situation that occurs when a district court has allegedly violated Rule 11 by participating in plea negotiations" may warrant a "lesser standard of review." *United States v. Nesgoda*, 559 F.3d 867, 869 n.1 (8th Cir. 2009) (describing the arguments in favor of a "less rigorous standard" as "somewhat compelling," but declining to adopt them because the case was on collateral rather than direct review). Where, as here, a judge's comments essentially serve "to assist defense counsel in persuading the defendant to follow counsel's advice ..., it is understandable that counsel would not object." *Cano-Varela*, 497 F.3d at 1132.[3] The application of a more

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[3] Even though Eleventh Circuit precedent dictated plain-error review, Mr. Davila preserved the argument for an alternative standard by quoting this passage from *Cano-Varela* in his appellate brief. *See* 10-15310 Docket Entry at 19 n.7 (Aug. 19, 2011).

forgiving standard could provide an alternative basis for affirming the Court of Appeals.

It is conceivable that the Court could avoid this question by holding that Mr. Davila is entitled to relief under any of the potential standards of review (or by holding that the government prevails even if it bears the burden of showing harmlessness). *See, e.g.*, *id.*; *Baker*, 489 F.3d at 373. It would be far more straightforward, however, for the Court to await a vehicle in which the parties agree on the applicable error-assessment framework.

III. THE DECISION BELOW IS CONSISTENT WITH THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THIS COURT'S CASES

The petition maintains that the Eleventh Circuit's approach to claims of improper judicial participation "cannot be squared with the text of Rule 11 or this Court's cases interpreting that Rule." Pet. 9. Specifically, the petition faults the Court of Appeals for supposedly disregarding Rule 11(h), which declares that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights," and for ignoring this Court's decisions in *United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004), which describe how plain-error review should be conducted when a judge fails to give a required notice during a Rule 11 plea colloquy. The petition's criticisms are misplaced. The decision below stands on sound doctrinal footing.

As previously explained, the Court of Appeals has not said that a defendant's conviction must be vacated whenever a judge makes a plea-related remark, even if it is apparent that the remark had no prejudicial effect. Instead, the best reading of Eleventh Circuit precedent is that the court has essentially folded the prejudice inquiry into the determination of whether there has been a violation of Rule 11(c)(1)'s prohibition on judicial participation. A Rule 11(c)(1) violation occurs when a judge makes statements that, taken in context, pressure the defendant to plead guilty rather than exercise his right to stand trial. Such pressure necessarily "affects substantial rights" and thus cannot qualify as "harmless error" under Rule 11(h), at least where the defendant later enters a guilty plea.

There is nothing novel about the notion that a finding of error can also constitute a finding of harm. In a variety of contexts, reviewing courts consider whether an act or omission is material or prejudicial before classifying it as an error. *See, e.g., United States v. Bagley*, 473 U.S. 667, 681-82 (1985) (due process is violated only if evidence withheld by prosecutors is material). Once the court finds error, "there is no need for further harmless-error review." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). The error is, by definition, "sufficient to undermine confidence in the outcome of the proceeding." *Dominguez-Benitez*, 542 U.S. at 83 (internal quotation marks omitted); *see also Bagley*, 473 U.S. at 679-80 (observing that a harmless-error inquiry "may as easily be stated as a materiality standard"); *cf. Dominguez-Benitez*, 542 U.S. at 82 (describing *Bagley* as "a sensible model to follow" in the Rule 11 context).

Focusing the inquiry on the materiality of a judge's comments is sensible. Rather than encouraging a reviewing court to engage in freewheeling speculation about whether a defendant would have pled guilty on the same terms in an alternate universe in which improper judicial participation had not occurred, it pushes the court toward a more objective analysis. The court examines the disputed judicial comments and the specific context in which they were made and considers their likely effect on a rational defendant. This Court has frequently expressed its preference for objective inquiries over subjective ones. *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011) (whether police interrogation is "custodial" "is an objective inquiry" that "involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning"); *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 n.7 (2011) (noting this Court's repeated "rejection of subjective inquiries in [various] areas of criminal law").

Neither *Vonn* nor *Dominguez-Benitez* precludes this sort of approach. Those cases dealt with a particular type of Rule 11 violation—a judge's erroneous omission of a discrete piece of information from a plea colloquy. The Court did not purport to hold that the stand-alone prejudice inquiry required in that context is required for all Rule 11 violations. *See Baker*, 489 F.3d at 372 ("Obviously, not all Rule 11 violations are created equal."). Judicial participation errors are "qualitatively different" from the errors at issue in *Vonn* and *Dominguez-Benitez*, and it is entirely appropriate for a court to approach them differently. *Id.*

None of this is to suggest that this Court could not choose to classify judicial participation violations as "structural errors" (although, to reiterate, the Eleventh Circuit has never described them that way). The petition's contrary arguments are unavailing. This Court has rejected the view that the only errors that may be deemed structural are "'fundamental constitutional errors.'" Pet. 13 (quoting *Neder v. United States*, 527 U.S. 1, 7-8 (1999)); *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (describing it as "inconsistent with the reasoning of our precedents ... that *only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural"). It is the character of the error, not the source of the underlying right, that determines the error's status. Specifically, this Court has looked to "the difficulty of assessing the effect of the error" and "the "irrelevance of harmlessness." *Id.* Both of those criteria support the view that judicial participation errors qualify as structural.

First, it is unusually difficult to determine the precise effect of a Rule 11(c)(1) violation. When judges insert themselves into the plea negotiation process, they alter the course of the proceedings. A reviewing court cannot reliably draw conclusions about what the parties might have done absent the improper intervention when the intervention taints everything that comes after. In this respect, a judicial participation error bears a much closer resemblance to structural errors such as the denial of a defendant's right to self-representation, counsel of choice, or a public trial than it does to the typical "trial error." *Compare, e.g., Gonzalez-Lopez*, 548

U.S. 140 (counsel of choice); *Waller v. Georgia*, 467 U.S. 39 (1984) (public trial); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (self-representation), *with Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991) (defining "trial error" as "error which occurred during the presentation of the case to the jury, and ... may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt").

Second, judicial participation errors are worth correcting even if they cause no discernible harm to the defendant. As numerous courts have pointed out, the judicial participation prohibition serves not only to "diminish[] the possibility of judicial coercion of a guilty plea," but also to preserve "the judge's impartiality" and to avoid "creat[ing] a misleading impression of [the judge's] role in the proceedings." *Rodriguez*, 197 F.3d at 158-59. Even if there are strong indications that a particular defendant did not change his behavior as a result of a judge's improper comments, allowing his guilty plea to stand may nevertheless undermine "the integrity of the judicial process." Pet. App. 4a; *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality) ("An error is fundamental if it undermines confidence in the integrity of the criminal proceeding.").

Separate from the question of structural error, this Court could also hold that reviewing courts are entitled to remedy judicial participation violations without inquiring into prejudice pursuant to their supervisory powers (although, again, this is not

something the Court of Appeals purported to do here). The petition disputes this, asserting that courts may not use their supervisory authority to circumvent Rule 11(h), which requires harmless errors to be disregarded. Pet. 16.[4] But the sole case the petition offers in support of this proposition, *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), addressed the authority of a district court to supervise prosecutors, not the authority of an appellate court to supervise district courts. In *Nguyen v. United States*, 538 U.S. 69 (2003), the Court indicated that the *Bank of Nova Scotia* limitation does not apply when an error threatens "the proper administration of judicial business." *Id.* at 81 (internal quotation marks omitted).

The government, moreover, has at least implicitly recognized that an appellate court's authority to remedy a Rule 11(c)(1) violation does not depend solely on whether the error prejudiced the defendant. On several occasions, the government has successfully raised judicial participation challenges in an effort to protect its own interests. *See, e.g., In re United States*, 572 F.3d 301 (7th Cir. 2009) (granting

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[4] It is actually not apparent that Rule 11(h), which refers to "*variance[s]* from the requirements of this rule," applies to judicial participation errors. A "variance" is "[a] difference or disparity between two statements or documents that ought to agree." Black's Law Dictionary at 1692 (9th ed. 2009). That definition no doubt encompasses a situation in which a court deviates from the standard plea colloquy script, and that sort of deviation is what the Advisory Committee had in mind when it added section (h) to the Rule. In contrast, one would not typically describe a court's improper intervention into plea negotiations as a "variance."

government's petition for a writ of mandamus to disqualify judge who violated Rule 11(c)(1)); *United States v. Werker*, 535 F.2d 198, 200 (2d Cir. 1976) (exercising "supervisory power" and granting government's request to bar district court from disclosing the sentence it intended to impose if defendant accepted plea). If courts may remedy a judicial participation error that causes no apparent prejudice to a defendant when it is the government that identifies the error, then surely they may also do so when the error is identified by the defendant or by the court itself.

The Eleventh Circuit has not run afoul of any of this Court's cases and is not out of step with the other Courts of Appeals. It correctly remedied the egregious judicial participation violation in this case. Its sister circuits would have done the same. There is no need for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Pete Theodocion
J. PETE THEODOCION, P.C.
507 Walker Street
Augusta, GA 30901
(706) 993-1171

E. Joshua Rosenkranz
Counsel of Record
Robert M. Yablon
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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REPLY BRIEF

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No. 12-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY DAVILA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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UNITED STATES OF AMERICA, PETITIONER

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REPLY BRIEF FOR THE UNITED STATES

The court of appeals in this case held that a defendant "*need not show actual prejudice*" to obtain appellate relief for a violation of Federal Rule of Criminal Procedure 11(c)(1). Pet. App. 3a (quoting *United States* v. *Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993)) (emphasis added by court of appeals). "Notably," the court continued, "while other circuits recognize harmless error in the context of judicial participation, we do not." *Ibid.* (citing *United States* v. *Casallas*, 59 F.3d 1173, 1177 n.8 (11th Cir. 1995)). Respondent suggests that the court of appeals (like, he contends, other circuits that have adopted similar rules dispensing with prejudice analysis for Rule 11(c)(1) violations) in fact applies prejudice analysis and is in fact substantially consistent with other circuits that apply all four prongs of plain-error review to erroneous judicial participation in plea-agreement discussions.

As the petition explains, the court of appeals' practice of automatically vacating for any Rule 11(c)(1) error conflicts with the decisions of other courts of appeals; this Court's decisions in *United States* v. *Vonn*, 535 U.S. 55 (2002), and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004); and Rules 11(h) and 52. It creates the possibility that any prosecution involving plea bargaining—which describes the vast majority of prosecutions—could result in a vacated conviction or sentence, based on error that the government did not cause, that the government was powerless to prevent, and that neither the government nor the district court can remedy without appellate intervention. This case squarely presents the court of appeals' aberrant approach for further review, and this Court should grant certiorari.

A. The Court Of Appeals Erroneously Grants Automatic Appellate Relief For Rule 11(c)(1) Error, Irrespective Of Prejudice

1. Respondent defends the court of appeals' approach by characterizing it as folding the prejudice prong of plain-error review into the assessment of whether a Rule 11(c)(1) violation occurred in the first place. See Br. in Opp. 8-14. Respondent's description of the decision below, and of circuit law more generally, is inaccurate. And even if it were accurate, it would make review by this Court all the more imperative, because it would demonstrate that the court of appeals' erroneous approach to appellate review has seriously distorted the operation of Rule 11(c)(1).

Rule 11(c)(1) does not, and could not, incorporate prejudice analysis of the sort that Rules 11(h) and 52 require. That prejudice analysis is retrospective. As this Court has made clear, plain-error review of a Rule 11 claim encompasses the "whole record," *Vonn*, 535 U.S.

at 59, including events that occurred *after* the Rule 11 violation, such as a defendant's statements at sentencing, *Dominguez Benitez*, 542 U.S. at 84-85. Rule 11(c)(1) itself, however, is forward-looking: it prescribes a procedure for courts to follow in cases involving plea negotiations, and, like many prophylactic procedural rules, its primary purpose is to prevent violations from happening in the first place. Because a judge needs to know ahead of time whether certain comments would be permissible, the assessment of a Rule 11(c)(1) violation cannot depend on the retrospective inquiry into whether a defendant could "satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Dominguez Benitez*, 542 U.S. at 83 (citation and internal quotation marks omitted).

The court of appeals appreciates the difference between the focused inquiry into whether a district court participated in plea negotiations in particular proceedings (the province of Rule 11(c)(1)) and the whole-record inquiry into whether such participation affected the outcome of the proceeding so as to warrant appellate relief (the province of Rule 52). And it consciously dispenses with the latter inquiry. While the decision below expressly analyzed whether the magistrate judge's comments violated Rule 11(c)(1), Pet. App. 3a-4a, it deliberately excused respondent from having to "show any individualized prejudice" to obtain appellate relief, *id.* at 5a; see *id.* at 3a. Nowhere did the decision address the government's argument—made at length in its appellate brief—that respondent could not show "a reasonable probability that, but for the error, he would not have entered the plea" because (1) three months elapsed be-

tween the magistrate judge's comments and the plea (during which respondent expressly requested a speedy trial); (2) a different judge presided over the plea; and (3) respondent expressly denied any coercion or pressure to plead, represented that he pleaded for strategic reasons, and never once mentioned the magistrate judge's comments (either on his own or through counsel) until the court of appeals uncovered them. Gov't C.A. Br. 15 (quoting *Dominguez Benitez*, 542 U.S. at 83); see *id.* at 11-12, 15-19. Instead, all that mattered to the court of appeals was that "the magistrate judge's comments * * * amounted to judicial participation in plea discussions" and respondent "pled guilty after these comments were made." Pet. App. 5a.

Other circuit decisions similarly dispense with prejudice analysis. See, *e.g.*, *United States* v. *Tobin*, 676 F.3d 1264, 1304 (11th Cir.) (vacating sentence and stating that "it is not necessary for a defendant to show that he was actually prejudiced"), cert. denied, No. 12-6353 (Nov. 26, 2012); *Corbitt*, 996 F.2d at 1135 (vacating plea and stating that "the defendant need not show actual prejudice"). Respondent's citations (Br. in Opp. 12) to a decision interpreting Rule 11(c)(1) not to cover certain comments that did not address the potential consequences of a plea, *United States* v. *Johnson*, 89 F.3d 778, 779-784 (11th Cir. 1996), and a decision recognizing that a Rule 11(c)(1) violation in one criminal proceeding does not necessarily constitute reversible error in another criminal proceeding, *Casallas*, 59 F.3d at 1179, do not show otherwise. Indeed, the court of appeals expressly relied on both of those decisions in discussing why respondent could obtain relief without showing prejudice. Pet. App. 3a.

Nor do *United States* v. *Diaz*, 138 F.3d 1359 (11th Cir.), cert. denied, 525 U.S. 913 (1998), or *United States* v. *Tobin*, *supra*, disprove the existence of the automatic-vacatur rule. See Br. in Opp. 12-14. In both of those cases, the defendant went to trial following the judicial-participation error, so the primary issue was whether to vacate the sentence, not whether to vacate a plea. *Diaz* "held that the remedy of re-sentencing * * * was not necessary," reasoning in large part that the sentencing had not raised impartiality concerns because "the district court was constrained by the sentencing guidelines." *Tobin*, 676 F.3d at 1308 (discussing *Diaz*); see *Diaz*, 138 F.3d at 1364. *Tobin*, however, found *Diaz* to be a relic of the days when the Sentencing Guidelines were mandatory, and the court *did* order resentencing, stating that "the presence or absence of actual bias or prejudice is irrelevant." 676 F.3d at 1308 n.26.

Tobin thus not only effectively overruled *Diaz*, but also illustrates the extent to which the court of appeals has taken its automatic-vacatur approach. In the court of appeals' view, a defendant is always entitled to appellate relief whenever a judge's comments might be seen to have encouraged a plea—even if the defendant decided *not* to plead, had a full and fair trial, and can identify no prejudice in his sentencing. *Tobin*, 676 F.3d 1303-1308. Although respondent correctly notes (Br. in Opp. 13-14) that *Tobin* vacated the sentence of only one of three relevant defendants, that was not because of any prejudice analysis, but instead simply because the others "ha[d] not challenged their sentences in any way." *Id.* at 1308 n.27.

2. To the extent respondent acknowledges the possibility that the decision below reflects an automatic-vacatur approach to Rule 11(c)(1) violations, he offers

little defense of that approach. See Br. in Opp. 29-32. He can identify no decision of this Court that elevates the violation of a Federal Rule of Criminal Procedure to the pantheon of errors this Court has deemed to be structural. See Pet. 12-13. Had the drafters of the Rule intended such a novel result, they presumably would have said so—and surely would not have included a harmless-error provision in the text of Rule 11 itself. See Fed. R. Crim. P. 11(h). As the petition explains, Rule 11(h) was added in 1983 precisely to "end the practice * * * of reversing automatically for any Rule 11 error." *Vonn*, 535 U.S. at 66. Neither the text of Rule 11(h) nor the accompanying advisory committee's notes admits of an exception for Rule 11(c)(1) violations. See, *e.g.*, Fed. R. Crim. P. 11 advisory committee's note (1983) ("Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11.").

Contrary to respondent's suggestion (Br. in Opp. 30-31), a court is not free to disregard Rule 11(h) simply because it thinks Rule 11(c)(1) errors are "worth correcting." See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (recognizing that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by" a federal rule); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (declining to "creat[e] out of whole cloth * * * an exception" to Fed. R. Crim. P. 52(b), "an exception which we have no authority to make").* In any event, a Rule 11(c)(1) error, like almost every other error in the federal criminal system, is not "worth correcting" when the

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* This Court rejected a similar effort to carve out an exception to plain-error review for breaches of a plea agreement in *Puckett* v. *United States*, 556 U.S. 129, 134-136 (2009). If that is true for a constitutional error, it is surely true for a rule-based error.

defendant is not prejudiced. See Fed. R. Crim. P. 52; *Dominguez Benitez*, 542 U.S. at 81-82; see also Pet. 13-14. That is particularly true where, as here, the requested "correct[ion]"—a chance to proceed before a fresh judge—duplicates procedure that the defendant has already received. See Pet. 19; pp. 8-9, *infra*.

B. The Conflicting Approaches Of Different Courts Of Appeals Warrant This Court's Review

As the petition demonstrates (Pet. 16-20), and as the court of appeals itself acknowledged (Pet. App. 3a), the court of appeals' automatic-vacatur approach conflicts with the decisions of several other circuits. Respondent's contrary view (Br. in Opp. 14-19) is largely premised on his misconstruction of the decision below and his failure to acknowledge the distinction between whole-record "prejudice" review and the inquiry into whether particular comments violated Rule 11(c)(1).

Respondent's argument also reads the Eleventh Circuit's Rule 11(c)(1) precedents too constrictively. If anything, the Eleventh Circuit's view of what constitutes Rule 11(c)(1) error is broader, not narrower, than that of other circuits. See Pet. 19. The Eleventh Circuit considers Rule 11(c)(1) to be a "bright line rule" that "prohibits 'the participation of the judge in plea negotiations under any circumstances . . . and admits of no exceptions.'" Pet. App. 3a (quoting *Johnson*, 89 F.3d at 783) (brackets omitted). It thus "usually refrain[s] from inquiring into the degree of judicial participation." *Id.* at 4a (citing *Casallas*, 59 F.3d at 1178). In *Casallas*, for example, the Eleventh Circuit found a Rule 11(c)(1) violation, and vacated a plea, merely because a judge—in an "innocuous" attempt "to insure that [the defendant] was making an informed decision"—pointed out the obvious fact that the mandatory minimum ten-year sen-

tence under the plea was "a lot better" than a mandatory minimum 15-year sentence if the defendant were found guilty at trial and suggested that the defendant "talk to his lawyer some and see if that is really what he wants to do." 59 F.3d at 1177; see *Corbitt*, 996 F.2d at 1133-1135 (concluding that judge violated Rule 11(c)(1) by saying, "They want to go out and get arrested, they come in here and they'll get a fair trial, and if they get found guilty, they'll also get a fair sentence, fairly high."); see also *Tobin*, 676 F.3d at 1303-1307 (discussing other Rule 11(c)(1) precedent and concluding that judge violated Rule 11(c)(1) by encouraging informed plea negotiations).

Respondent accordingly lacks foundation for asserting (Br. in Opp. 16-18) that the Eleventh Circuit would find no error at all in *United States* v. *Pagan-Ortega*, 372 F.3d 22 (1st Cir. 2004), and *United States* v. *Ebel*, 299 F.3d 187 (3d Cir. 2002). Both cases involved judicial comments at least as intrusive as the comments in *Casallas*: the judge in *Pagan-Ortega* told the defendant that the plea agreement was a "super break" and "really . . . a good deal," 372 F.3d at 26-27, and the judge in *Ebel* told the defendant he would sentence him "to the low end of the sentencing range if he pled guilty," 299 F.3d at 191. The First and Third Circuits nevertheless left the pleas in place based on plain-error and harmless-error analysis. *Pagan-Ortega*, 372 F.3d at 27-28; *Ebel*, 299 F.3d 191-192. The Eleventh Circuit would have done otherwise.

Similarly unfounded is respondent's suggestion (Br. in Opp. 20-23) that he would prevail in this case even if plain-error review were applied. See Pet. 19. Among other things, respondent has no answer for the petition's observation (*ibid.*) that the procedure he received in the

district court—the passage of time (three months) and a new judge—is identical to the appellate remedy that everyone (including respondent and the Eleventh Circuit) agrees would remove any taint of Rule 11(c)(1) error. Nothing in law or logic suggests that respondent needs to start over with yet another judge, or that reassignment is an effective remedy only when a court of appeals orders it. If that were so, then district courts would be powerless to fix Rule 11(c)(1) errors on their own.

Respondent does not and cannot deny that the circuits vary in whether they apply plain-error and harmless-error review to Rule 11(c)(1) errors, and his characterization of the conflict as reflecting only "modest semantic differences" (Br. in Opp. 19) is not borne out by the results of the cases. Notwithstanding some circuits' purely theoretical skepticism (*id.* at 15) that Rule 11(c)(1) error can be non-prejudicial, the foregoing discussion illustrates that application of prejudice analysis has outcome-determinative consequences in actual cases—including this one. As the petition explains (Pet. 20-21), cases of non-prejudicial Rule 11(c)(1) error may well become more common as district courts follow the suggestion of *Missouri* v. *Frye*, 132 S. Ct. 1399, 1406-1407 (2012), to conduct more robust colloquies into the effective assistance of counsel during plea negotiations. The circuit conflict over how to review such non-prejudicial violations will not resolve itself and requires this Court's intervention. See Pet. 19-20.

C. This Case Is An Ideal Vehicle For Reviewing The Question Presented

Respondent's vehicle arguments (Br. in Opp. 19-26) lack merit. Respondent primarily contends (*id.* at 20-23) that this case is an unsuitable vehicle because he would

prevail even if plain-error review applied. For reasons discussed above (pp. 8-9, *supra*), and in the petition (Pet. 19), that contention is incorrect. In any event, the prejudice issue here is at the very least a close one that would require careful scrutiny of the entire record by the court of appeals. The question presented asks whether the court of appeals erred in concluding that it could skip such prejudice analysis entirely. See Pet. i. Nothing would impede this Court from answering that question and remanding to the court of appeals for application of the plain-error test. *United States* v. *Marcus*, 130 S. Ct. 2159, 2167 (2010); see *Dominguez Benitez*, 542 U.S. at 86; *Vonn*, 535 U.S. 76.

Respondent also contends (Br. in Opp. 24-26) that it is unclear whether plain-error review, as opposed to merely harmless-error review, applies to Rule 11(c)(1) errors. But that poses no obstacle to further review in this case, because the court of appeals concluded that *neither* standard applies. Pet. App. 3a. In any event, respondent forfeited any argument on this point by adverting to it only in a parenthetical quotation attached to a "Cf." citation in a footnote of his opening appellate brief. Resp. C.A. Br. 19 n.7; see *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Comm'n*, 453 F.3d 1309, 1316 n.7 (11th Cir. 2006) (finding argument to be "waived because it appears only in a footnote in [the] initial brief and is unaccompanied by any argument"). Respondent identifies no circuit that has actually held that harmless-error review would apply in this situation, and the government is aware of none. The government should not be forced to await the development of a circuit conflict on this subsidiary issue, which has significance only if the Eleventh Circuit's au-

tomatic-vacatur approach is wrong, before it can obtain review of the automatic-vacatur approach itself.

Respondent finally contends (Br. in Opp. 23-24) that certain practical concerns that the petition raises about the automatic-vacatur approach are not present in this case. That is not a meaningful argument about the suitability of this case as a vehicle for addressing the question presented. The decision below is based solely on the automatic-vacatur approach, and nothing would prevent the Court from using this case to review that approach. In any event, this case does indeed illustrate many of the approach's problems. The court of appeals vacated a valid guilty plea, notwithstanding respondent's representation that the plea was a "strategic decision" rather than the product of coercion, his failure to ever mention the magistrate judge's comments until the court of appeals unearthed them, and his already having received materially the same remedy that the court of appeals decided to grant (reassignment of the case). See Pet. 6-8, 19. The decision cannot be reconciled with the Federal Rules of Criminal Procedure, this Court's jurisprudence, or sound principles of judicial administration. This Court should grant certiorari and reverse.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2012

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB
OFFICE OF
SUPREME COURT

No. 12-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY DAVILA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

DONALD B. VERRILLI, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record
for Petitioner

E. JOSHUA ROSENKRANZ
Orrick, Herrington &
Sutcliffe LLP
51 West 52nd Street
New York, N.Y. 10019
jrosenkranz@orrick.com
(212) 506-5000

Counsel of Record
for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED: AUG. 3, 2012
CERTIORARI GRANTED: JAN. 4, 2013

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket No. 10-15310

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
11/15/10	USDC Motion regarding appellant's attorney as to Appellant Anthony Davila was filed on 11/15/2010. Docket Entry 97.
11/19/10	CRIMINAL APPEAL DOCKETED. Notice of appeal filed by Appellant Anthony Davila on 11/15/2010. Fee Status: IFP Granted.
11/29/10	CJA 20 voucher issued by this court to Michael N. Loebl for Anthony Davila.
12/1/10	MOTION for appointment of counsel filed by Michael N. Loebl for Anthony Davila. Opposition to Motion is Unknown [6192656-1]
12/3/10	Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Michael N. Loebl for Appellant Anthony Davila.

DATE	PROCEEDINGS
12/6/10	TRANSCRIPT INFORMATION FORM filed. Transcript Order: Rhea Rangel, Anthony Davila, Plea Hearing 05/17/2010; Transcript Order: Rhea Rangel, Anthony Davila, Sentencing 11/15/2010.
12/6/10	TRANSCRIPT INFORMATION FORM filed. Transcript Order: Unknown Reporter, Anthony Davila, Pre-Trial Proceedings 02/08/2010, Pre-Trial Proceedings 02/24/2010, Pre-Trial Proceedings 06/01/2009, Pre-Trial Proceedings 08/03/2010.
12/8/10	APPEARANCE of Counsel filed by Attorney R. Brian Tanner for Appellee USA in 10-15310.
12/9/10	Added Attorney(s) R. Brian Tanner for party(s) Appellee USA, in case 10-15310.
12/9/10	Court Reporter Acknowledgment filed. Transcript Order: Rhea Rangel, 12/06/2010, Anthony Davila, Plea Hearing 05/17/2010, Sentencing 11/15/2010
12/15/10	USDC order Denying motion to appoint counsel and denying motion to withraw as attorney as to Appellant Anthony Davila was filed on 12/15/2010. Docket Entry 114.
12/20/10	MOTION to withdraw as counsel filed by Attorney Michael N. Loebl for Appellant Anthony Davila. Opposition to Motion is Unknown [6204699-1]

DATE	PROCEEDINGS
12/20/10	Court Reporter Acknowledgment filed. Transcript Order: Unknown Reporter, 12/06/2010, Anthony Davila, Pre-Trial Proceedings 02/08/2010, Pre-Trial Proceedings 08/03/2010, Pre-Trial Proceedings 02/24/2010, Pre-Trial Proceedings 06/01/2009
1/13/11	Notification by Court Reporter Rhea Rangel that transcripts were filed in District Court. Transcript Order: Dt.all Trans. Filed: 01/11/2011.
1/14/11	MOTION to stay further appellate proceedings filed by Attorney Michael N. Loebl for Appellant Anthony Davila. Opposition to Motion is Unknown [6219453-1]
1/19/11	TRANSCRIPTS FILED. Transcript Order: Filer: Anthony Davila, Dt.all Trans. Filed: 01/11/2011, Proceeding Type and Date: Plea Hearing 05/17/2010, Sentencing 11/15/2010; Transcript Order: Filer: Anthony Davila, Dt. all Trans. Filed: 01/18/2011, Proceeding Type and Date: Pre-Trial Proceedings 02/08/2010, Pre-Trial Proceedings 06/01/2009, Pre-Trial Proceedings 08/03/2010, Pre-Trial Proceedings 02/24/2010.
1/19/11	Motion—4 issued to appellant..
1/28/11	Motion for appointment of counsel filed by Appellant Anthony Davila.

DATE	PROCEEDINGS
2/3/11	ORDER: Appellant's "Motion for a Ruling for Appointment of Conflict Free Counsel for Purpose of Appeal", construed as a motion to discharge attorney Loebl as counsel and to appoint substitute counsel in his stead, is DENIED. [6192656-2]; Attorney Loebl's motion to withdraw as counsel for Appellant is DENIED AS MOOT. [6204699-2]; Appellant's "Motion to Stay Proceedings..." is DENIED. [6219453-2] GBT
2/14/11	Briefing Notice issued in appeals 10-15310 & 11-10224. The appellant brief and record excerpts are due on or before 03/15/2011. [10-15310, 11-10224]
3/9/11	Over the phone extension granted by clerk. Appellant's brief due on 03/22/2011.
3/22/11	E-Brief Tendered: Appellant brief for Appellant Anthony Davila.
3/25/11	MOTION for leave to file appellant brief, record excerpts and motion to withdraw as counsel out of time. (Attorney Michael N. Loebl) [6268389-1]—[Edited 03/30/2011 by JC] [6268389-1]
3/30/11	RESPONSE to Motion for Leave to File Appellant Brief, Record Excerpts and Motion to Withdraw as Counsel Out of Time. (Appellant Anthony Davila)

DATE	PROCEEDINGS
4/4/11	ORDER: "Appellant's Unopposed Motion to File Initial Brief, Record Excerpts, and Motion to Withdraw Out of Time" is GRANTED. (EEC) [10-15310, 11-10224]
4/4/11	MOTION to withdraw as counsel filed by Attorney Michael N. Loebl in 10-15310 & 11-10224. [6273564-1] [10-15310, 11-10224]
4/4/11	Appellant's Anders Brief filed by Attorney Michael N. Loebl in 10-15310 & 11-10224. Service date: 03/22/2011 by US mail to Appellant Davila and Attorney for Appellee: Tanner. [10-15310, 11-10224]
4/4/11	Record Excerpts filed by Attorney Michael N. Loebl in 10-15310 & 11-10224. Service date: 03/22/2011 by US mail to Attorney for Appellee: Tanner. [10-15310, 11-10224]
4/22/11	Appellant's brief filed by Anthony Davila. Service date: 04/19/2011 [10-15310] to Attorney for Appellant: Loebl and Attorney for Appellee: Tanner by US mail.
4/22/11	Record on Appeal filed. Pleadings, 1 volumes; Transcript, 5 volumes; Transcript, 4 volumes; Exhibit Envelope, 1 volumes; Pre-Sentence Report, 1 volumes [10-15310, 11-10224]
7/11/11	ORDER: Counsel's motion to withdraw is DENIED WITHOUT PREJUDICE. Counsel may renew his motion under Anders or, alternatively, file a merits brief that challenges the magistrate's pre-plea statements

DATE	PROCEEDINGS
	under Rule 11(c)(1), or raise any other issue that he deems to have arguable merit. (JLE) See file folder for complete text. [10-15310, 11-10224]
8/19/11	E-Brief Tendered: Appellant brief for Appellant Anthony Davila.
8/19/11	MOTION to supplement the record filed by Attorney Michael N. Loebl for Appellant Anthony Davila. [6369297-1]
8/19/11	Appellant's brief filed by Anthony Davila in 10-15310, 11-10224. Service date: 08/18/2011 [11-10224] Attorney for Appellee: Tanner—US mail; [10-15310] Attorney for Appellee: Tanner—US mail. [10-15310, 11-10224]
8/19/11	Record Excerpts filed by Appellant Anthony Davila in 10-15310, 11-10224. Service date: 08/18/2011 US mail—Attorney for Appellee: Tanner. [10-15310, 11-10224]
9/20/11	ORDER: Appellant's "Motion for Leave to Supplement Record" is GRANTED. (GBT) [10-15310, 11-10224]
9/20/11	1 Envelope of Supplemental Exhibits Filed.
9/22/11	Over the phone extension granted by clerk. Appellee's Brief due on 09/29/2011. [10-15310, 11-10224]
9/29/11	E-Brief Tendered: Appellee brief for Appellee USA in 10-15310, 11-10224. [10-15310, 11-10224]

DATE	PROCEEDINGS
9/30/11	Appellee's Brief filed by Appellee USA in 10-15310, 11-10224. Service date: 09/29/2011 US mail—Attorney for Appellant: Loebl. [10-15310, 11-10224]
10/11/11	Over the phone extension granted by clerk. Updated Reply Brief. Due on 10/24/2011. [10-15310, 11-10224]
10/24/11	E-Brief Tendered: Reply brief for Appellant Anthony Davila.
10/25/11	Reply Brief filed by Appellant Anthony Davila in 10-15310, 11-10224. Service 10/24/2011 US mail—Attorney for Appellee: Tanner. [10-15310, 11-10224]
12/21/11	Opinion issued by court as to Appellant Anthony Davila in 10-15310, 11-10224. Decision: Affirmed in part and Reversed in part. Opinion type: Published. Opinion method: Per Curiam. [10-15310, 11-10224]
12/21/11	Judgment entered as to Appellant Anthony Davila in 10-15310, 11-10224. [10-15310, 11-10224]
1/6/12	MOTION for extension of time to file a request for rehearing filed by Attorney R. Brian Tanner. [6460181-1]
1/12/12	ORDER: The Appellee's motion for extension of time to file a request for rehearing, up to and including February 10, 2012, is GRANTED. [6460181-2] (GBT) [10-15310, 11-10224]

DATE	PROCEEDINGS
1/13/12	APPEARANCE of Counsel Form filed by Deborah K. Snyder for USA [10-15310, 11-10224] (ECF: Deborah Snyder)
1/13/12	APPEARANCE of Counsel Form filed by Frank P. Cihlar United States [10-15310, 11-10224] (ECF: Frank Cihlar)
1/13/12	APPEARANCE of Counsel Form filed by Frank P. Cihlar United States [10-15310, 11-10224] (ECF: Frank Cihlar)
1/13/12	Added Attorney(s) Frank Phillip Cihlar for party(s) Appellee USA, in case 10-15310.
1/13/12	Added Attorney(s) Deborah K. Snyder for party(s) Appellee USA, in case 10-15310.
1/19/12	APPEARANCE of Counsel Form filed by Gregory Victor Davis for USA [10-15310, 11-10224] (ECF: Gregory Davis)
1/19/12	Added Attorney(s) Gregory Victor Davis for party(s) Appellee USA, in case 11-10224 Attorney(s) Gregory Victor Davis for party(s) Appellee USA, in case 10-15310. [10-15310, 11-10224]
2/1/12	APPEARANCE of Counsel Form filed by S. Robert Lyons for USA (ECF: Samuel Lyons)
2/1/12	Added Attorney(s) Samuel Robert Lyons for party(s) Appellee USA, in case 10-15310.
2/9/12	Petition for rehearing en banc filed by Appellee USA. (ECF: Deborah Snyder)

DATE	PROCEEDINGS
2/13/12	Notice of deficient Rehearing. Missing Paper briefs filed by Deborah K. Snyder for USA.
2/13/12	MOTION Motion for leave to file paper copies of government's petition for rehearing en banc out of time filed by Appellee USA. Opposition to Motion is Unknown [6492060-1] —[Edited 02/16/2012 by JSC] (ECF: Deborah Snyder)
2/14/12	Received corrected Efiling from previously deficient Rehearing filed by filed by Deborah K. Snyder for USA.—[Edited 02/15/2012 by TLR]
3/1/12	ORDER: Motion for Leave to File Paper Copies of Government's Petition for Rehearing En Banc Out of Time filed by Appellee USA is GRANTED. [6492060-2] GBT
3/23/12	Supplemental Authority in Support of Rehearing filed by Appellee USA. Service date: 03/23/2012 3rd party—Attorney for Appellant: Loebl; email—Attorney for Appellees: Cihlar, Davis, Lyons, Snyder. (ECF: Deborah Snyder)
4/6/12	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellee USA are DENIED. [6535572-1]

DATE	PROCEEDINGS
4/23/12	Mandate issued as to Appellant Anthony Davila in 10-15310, 11-10224. [10-15310, 11-10224]
4/24/12	RECORD RETURNED. Ten Volumes Record-on-Appeal, One Envelope of Exhibits, One sealed Envelope of Exhibits and One PSI returned to District Court. [10-15310, 11-10224]
5/10/12	Returned Mail was received for Party Anthony Davila. Address has been verified and updated, and mail has been issued again. April 23, 2012, letter
6/26/12	Extension for filing certiorari GRANTED until August 4, 2012 by U.S. Supreme Court as to Appellant Anthony Davila. (11A1243)
7/16/12	Returned Mail was received for Party Anthony Davila. April 23, 2012, letter. No forwarding address information available for appellant.
8/3/12	Notice of Writ of Certiorari filed as to Appellee USA. SC# 12-167.
9/13/12	Checked status of ceritorari 12-167 filed as to Appellant Anthony Davila Pending.
10/17/12	Checked status of ceritorari 12-167 filed as to Appellant Anthony Davila - Pending.
10/24/12	Public Communication: Letter from Appellant requesting status of Petition for Writ of Certiorari. (Docket Sheet mailed by Clerk to

DATE	PROCEEDINGS
	Appellant in response)—[Edited 11/15/2012 by TLR]
11/15/12	Checked status of ceritorari 12-167 filed as to Appellant Anthony Davila—Pending.
1/4/13	Writ of Certiorari filed as to Appellant Anthony Davila in 10-15310, 11-10224 is GRANTED. SC# 12-167. [10-15310, 11-10224]

UNITED STATES COURT OF APPEALS
FOR THE SOUTHERN DISTRICT OF GEORGIA
(Augusta)

Docket No. 1:09-cr-00060-DHB-GRS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/7/09	1	SEALED INDICTMENT as to Anthony Davila (1) count(s) 1, 2-12, 13-23, 24-34. (ljf) (Entered: 05/08/2009)
5/7/09	2	PENALTY CERTIFICATION by Government as to Anthony Davila. (ljf) (Entered: 05/08/2009)
5/7/09	3	Defendant Information Sheet as to Anthony Davila, (Document Restricted) (ljf) (Entered: 05/08/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
5/7/09	4	MOTION to Seal Case by USA as to Anthony Davila. REFERRED to Judge G. R. Smith. (ljf) (Entered: 05/08/2009)
5/7/09	5	ORDER granting 4 Motion to Seal Case until deft initially appears following his arrest, then all related papers to be unsealed as to Anthony Davila (1). Signed by Magistrate Judge G. R. Smith on 5/7/09. (ljf) (Entered: 05/08/2009)
5/20/09	6	MOTION to Unseal Case by USA as to Anthony Davila. REFERRED to Judge W. Leon Barfield. (ljf) (Entered: 05/20/2009)
5/20/09	7	ORDER granting 6 Motion to Unseal Case as to Anthony Davila (1) Signed by Judge J. Randal Hall on 5/20/09. (ljf) (Entered: 05/20/2009)
5/27/09	8	Arrest Warrant Returned Executed on 5/20/09 in Tampa, FL. in case as to Anthony Davila. (ljf) (Entered: 05/27/2009)
5/28/09	9	NOTICE OF HEARING as to Anthony Davila Arraignment set for 6/1/2009 02:00 PM in Augusta-1st Floor before Magistrate Judge W.

DATE	DOCKET NUMBER	PROCEEDINGS
		Leon Barfield. (lcw) (Entered: 05/28/2009)
6/1/09		Arrest of Anthony Davila in Middle District of Florida. (lcw) (Entered: 06/01/2009)
6/1/09	10	Rule 5(c)(3) Documents Received as to Anthony Davila (lcw) (Entered: 06/01/2009)
6/1/09	11	Minute Entry for proceedings held before Judge Magistrate Judge W. Leon Barfield: Arraignment as to Anthony Davila (1) Count 1, 2-12, 13-23, 24-34 held on 6/1/2009, Not Guilty Plea entered by Anthony Davila (1) Count 1, 2-12, 13-23, 24-34. Detention hearing scheduled for 06/09/09 at 2:00 pm. (Court Reporter FTR.) (lcw) (Entered: 06/01/2009)
6/1/09		MOTION for detention pending trial or sentencing by USA as to Anthony Davila. REFERRED to Judge W. Leon Barfield. (ljf) (Entered: 06/17/2009)
6/2/09	12	SCHEDULING ORDER as to Anthony Davila Motions due by 6/15/2009. Gov't responses due 10 days thereafter; gov't advised as to 404(b) evidence; Defense counsel reminded concerning the dissemination of dis-

DATE	DOCKET NUMBER	PROCEEDINGS
		covery material. Signed by Magistrate Judge W. Leon Barfield on 6/2/09. (aeh) (Entered: 06/02/2009)
6/2/09	13	MOTION Move Hearing Date by Anthony Davila. Responses due by 6/19/2009 (Attachments: # 1 Text of Proposed Order) (Loebl, Michael) (Entered: 06/02/2009)
6/2/09		MOTIONS as to Anthony Davila REFERRED to Magistrate Judge: 13 MOTION Move Hearing Date (cmr) (Entered: 06/02/2009)
6/3/09	14	ORDER OF TEMPORARY DETENTION as to Anthony Davila Detention Hearing set for 6/9/2009 02:00 PM in Augusta-1st Floor before Magistrate Judge W. Leon Barfield.. Signed by Magistrate Judge W. Leon Barfield on 6/3/09. (aeh) Modified on 6/3/2009 (aeh). (Entered: 06/03/2009)
6/4/09	15	ORDER granting 13 Motion to reschedule detention hearing as to Anthony Davila (1). Hearing rescheduled for June 9, 2009 at 9:30 am. Signed by Magistrate Judge W. Leon Barfield on 6/4/09. (aeh) (Entered: 06/04/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
6/4/09		Set/Reset Hearings as to Anthony Davila: Detention Hearing set for 6/9/2009 09:30 AM in Augusta-1st Floor before Magistrate Judge W. Leon Barfield. (aeh) (Entered: 06/04/2009)
6/9/09	16	Minute Entry for proceedings held before Judge Magistrate Judge W. Leon Barfield: Detention Hearing as to Anthony Davila held on 6/9/2009. Court orders deft detained pending trial; deft remanded to custody of USMS. (Court Reporter FTR.) (lcw) (Entered: 06/10/2009)
6/15/09	17	MOTION for Extension of Time to File Particularized Motions by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)
6/15/09	18	MOTION to participate in Voir Dire by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)
6/15/09	19	MOTION for Discovery, MOTION for Disclosure by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
6/15/09	20	MOTION for Witness List by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)
6/15/09		MOTIONS as to Anthony Davila REFERRED to Magistrate Judge: 20 MOTION for Witness List, 19 MOTION for Discovery MOTION for Disclosure, 17 MOTION for Extension of Time to File Particularized Motions, 18 MOTION to participate in Voir Dire (cmr) (Entered: 06/15/2009)
6/15/09	21	MOTION to Preserve Evidence by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)
6/15/09	22	MOTION Preserve Records as to Race of Veniremen by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)
6/15/09	23	MOTION to Produce *Exculpatory Evidence* by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
6/15/09	24	MOTION for Disclosure *of Seized Evidence* by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)
6/15/09	25	MOTION to Produce *grand jury proceedings* by Anthony Davila. Responses due by 7/2/2009 (Loebl, Michael) (Entered: 06/15/2009)
6/15/09		MOTIONS as to Anthony Davila REFERRED to Magistrate Judge: 24 MOTION for Disclosure *of Seized Evidence*, 21 MOTION to Preserve Evidence, 25 MOTION to Produce *grand jury proceedings*, 22 MOTION Preserve Records as to Race of Veniremen, 23 MOTION to Produce *Exculpatory Evidence* (cmr) (Entered: 06/15/2009)
6/17/09	26	ORDER granting [] Motion for detention pending trial or sentencing as to Anthony Davila (1). Signed by Magistrate Judge W. Leon Barfield on 6/17/09. (ljf) (Entered: 06/17/2009)
6/19/09	27	ORDER finding as moot [24-1] Motion requesting Govt to provide notice of intent to rely on evidence subject to suppression; as to Anthony Davila (1); denying 17 Motion

DATE	DOCKET NUMBER	PROCEEDINGS
		for Extension of Time w/in which to file motion to suppress as to Anthony Davila (1); denying [24-2] motion; granting 21 Motion to Preserve Evidence as to Anthony Davila (1); Deft allowed 10 calendar days to file particularized motion to suppress.. Signed by Magistrate Judge W. Leon Barfield on 6/19/09. (ljf) (Entered: 06/19/2009)
6/25/09	28	RESPONSE by USA as to Anthony Davila re 19 MOTION for Discovery MOTION for Disclosure, 23 MOTION to Produce *Exculpatory Evidence*, 18 MOTION to participate in Voir Dire, 20 MOTION for Witness List, 21 MOTION to Preserve Evidence, 25 MOTION to Produce *grand jury proceedings*, 22 MOTION Preserve Records as to Race of Veniremen (Rhodes, Patricia) (Entered: 06/25/2009)
7/7/09	29	First MOTION for Leave of Absence as to Anthony Davila For dates of: 08/31/09 through 09/07/09. Responses due by 7/24/2009 (Loebl, Michael) (Entered: 07/07/2009)
7/8/09	30	ORDER granting Michael Loebl's 29 Motion for Leave of Absence for the period of August 31-September 7,

DATE	DOCKET NUMBER	PROCEEDINGS
		2009 as to Anthony Davila (1). Signed by Judge J. Randal Hall on 7/8/09. (aeh) (Entered: 07/08/2009)
7/8/09	31	ORDER granting 23 Motion to Produce as to Anthony Davila (1); denying 25 Motion to Produce transcripts of grand jury proceedings as to Anthony Davila (1); granting 18 Motion to Participate in Vior Dire as to Anthony Davila (1); finding as moot [19-1] Motion for Discovery as to Anthony Davila (1); granting [19-2] Motion for Disclosure as to Anthony Davila (1); denying 20 Motion for Witness List as to Anthony Davila (1); granting 22 Motion as to Anthony Davila (1). Signed by Magistrate Judge W. Leon Barfield on 7/8/09. (aeh) (Entered: 07/08/2009)
7/15/09	32	RESPONSE by Anthony Davila *to Order of July 8, 2009* (Loebl, Michael) (Entered: 07/15/2009)
7/20/09	33	CJA 20 as to Anthony Davila: Appointment of Attorney Michael N. Loebl for Anthony Davila.. Signed by Magistrate Judge W. Leon Barfield on 6/1/09. (aeh) (Entered: 07/20/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
8/7/09	34	NOTICE OF HEARING as to Anthony Davila Jury Selection set for 9/14/2009 10:00 AM in Augusta-2nd Floor before Judge J. Randal Hall. Jury Trial set for 9/14/2009 10:00 AM in Augusta-2nd Floor before Judge J. Randal Hall. (jah) (Entered: 08/11/2009)
8/21/09	35	MOTION for Order of Competency to Stand Trial by Anthony Davila. Responses due by 9/8/2009 (Attachments: # 1 Exhibit Plea Agreement) (Loebl, Michael) (Entered: 08/21/2009)
8/21/09	36	RESPONSE by USA as to Anthony Davila re 35 MOTION for Order of Competency to Stand Trial (Rhodes, Patricia) (Entered: 08/21/2009)
9/1/09	37	ORDER granting 35 Motion for Order of Competency to Stand Trial as to Anthony Davila (1).. Signed by Judge J. Randal Hall on 9/1/09. (aeh) (Entered: 09/01/2009)
1/11/10	38	Psychiatric Report Received (Sealed) as to Anthony Davila (ljf) (Entered: 01/11/2010)
1/27/10	39	NOTICE OF HEARING as to Anthony Davila Competency Hearing

DATE	DOCKET NUMBER	PROCEEDINGS
		set for 2/23/2010 11:00 AM in Augusta-1st Floor before Magistrate Judge W. Leon Barfield. (lcw) (Entered: 01/27/2010)
2/3/10	40	NOTICE OF HEARING as to Anthony Davila In Camera Hearing set for 2/8/2010 04:00 PM in Augusta-1st Floor before Magistrate Judge W. Leon Barfield. (lcw) (Entered: 02/03/2010)
2/8/10	41	MOTION for Recusal filed by Anthony Davila. REFERRED to Judge W. Leon Barfield. (lcw) (Entered: 02/09/2010)
2/8/10		ORAL ORDER denying 41 Motion for Recusal as to Anthony Davila (1). By Magistrate Judge W. Leon Barfield on 02/08/2010. (lcw) (Entered: 02/09/2010)
2/8/10	42	Minute Entry for proceedings held before Magistrate Judge W. Leon Barfield: In Camera Hearing as to Anthony Davila held on 2/8/2010 (Court Reporter FTR.) (lcw) (Entered: 02/09/2010)
2/24/10	43	Minute Entry for proceedings held before Magistrate Judge W. Leon Barfield: Competency Hearing as to Anthony Davila held on 2/24/2010.

DATE	DOCKET NUMBER	PROCEEDINGS
		Parties agree with findings in evaluation. (Court Reporter FTR.) (lcw) Modified on 2/25/2010 (jah). (Entered: 02/25/2010)
3/4/10	44	REPORT AND RECOMMENDATIONS that the Defendant be found competent to stand trial as to Anthony Davila Objections to R&R due by 3/22/2010. Signed by Magistrate Judge W. Leon Barfield on 3/4/10. (aeh) (Entered: 03/04/2010)
3/4/10	45	ORDER directing the Clerk to serve the Report and Recommendations on counsel for all parties as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 3/4/10. (aeh) (Entered: 03/04/2010)
3/5/10	46	MOTION for Speedy Trial by Anthony Davila. Responses due by 3/18/2010 (Loebl, Michael) (Entered: 03/05/2010)
3/5/10		MOTIONS as to Anthony Davila REFERRED to Magistrate Judge: 46 MOTION for Speedy Trial (aeh) (Entered: 03/05/2010)
3/8/10		Motion No Longer Referred as to Anthony Davila: 46 MOTION for Speedy Trial (jah) (Entered: 03/08/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
3/16/10	48	NOTICE *with the Intent to Redact* by Anthony Davila (Loebl, Michael) (Entered: 03/16/2010)
3/16/10	49	Transcript Redaction Request in case as to Anthony Davila re 47 Transcript,, filed by attorney Michael N. Loebl (Loebl, Michael) (Entered: 03/16/2010)
3/18/10	50	NOTICE OF FILING OF REDACTED OFFICIAL TRANSCRIPT of Detention Hearing Proceedings as to Anthony Davila held on June 9, 2009, before Judge W. Leon Barfield. Court Reporter/Transcriber C. Joan Mobley, Telephone number 912-280-1348. Tape Number: FTR. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. (Transcript Redaction Policy Issued or Click here to view Transcript Redaction Policy) Redaction Request due 4/8/2010. Redacted Transcript Deadline set for 4/19/2010. Release of Transcript Restriction set for 6/16/2010. (Mobley, Joan) (Entered: 03/18/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
3/18/10	51	CJA 24 as to Anthony Davila: Authorization to Pay Joan Mobley $ 266.45 for Transcript,. Signed by Magistrate Judge W. Leon Barfield on 3/18/10. (aeh) (Entered: 03/18/2010)
3/23/10	52	ORDER ADOPTING REPORT AND RECOMMENDATIONS as to Anthony Davila for 44 Report and Recommendations. The defendant is competent to stand trial. Signed by Judge J. Randal Hall on 3/23/10. (aeh) (Entered: 03/23/2010)
3/25/10	53	NOTICE OF HEARING as to Anthony Davila Jury Selection set for 4/19/2010 09:00 AM in Augusta-2nd Floor before Judge J. Randal Hall. Jury Trial set for 4/19/2010 09:00 AM in Augusta-2nd Floor before Judge J. Randal Hall. (jah) (Entered: 03/25/2010)
3/29/10	54	First MOTION to Continue *Trial* by USA as to Anthony Davila. Responses due by 4/12/2010 (Rhodes, Patricia) (Entered: 03/29/2010)
4/2/10	55	RESPONSE to Motion by Anthony Davila re 54 First MOTION to Continue *Trial* (Loebl, Michael) (Entered: 04/02/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
4/2/10	56	ORDER granting 54 Motion to Continue Jury Selection and Trial as to Anthony Davila (1). The clerk is directed to remove the case from the Court's April 19, 2010 calendar. Signed by Judge J. Randal Hall on 4/2/10. (aeh) (Entered: 04/02/2010)
4/2/10		Terminate Deadlines and Hearings as to Anthony Davila: (aeh) (Entered: 04/14/2010)
5/12/10	57	NOTICE OF HEARING as to Anthony Davila Change of Plea Hearing set for 5/17/2010 02:00 PM in Augusta-2nd Floor before Judge J. Randal Hall. (jah) (Entered: 05/12/2010)
5/17/10	60	Minute Entry for proceedings held before Judge J. Randal Hall: Change of Plea Hearing as to Anthony Davila held on 5/17/2010 (Court Reporter Rhea Rangel.) (jah) (Entered: 05/21/2010)
5/17/10	61	CHANGE OF PLEA entered by Anthony Davila (1) Guilty Count 1. (jah) (Entered: 05/21/2010)
5/17/10	62	PLEA AGREEMENT as to Anthony Davila (jah) (Entered: 05/21/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
5/17/10		Plea Agreement Accepted as to Anthony Davila (jah) (Entered: 05/21/2010)
5/18/10	58	MOTION for Leave of Absence as to Anthony Davila For dates of: June 21-June 25, 2010. Responses due by 6/1/2010 (Loebl, Michael) (Entered: 05/18/2010)
5/20/10	59	ORDER granting Michael Loebl's 58 Motion for Leave of Absence for the period of June 21-25, 2010 as to Anthony Davila (1). Signed by Judge J. Randal Hall on 5/20/10. (aeh) (Entered: 05/20/2010)
6/11/10	63	MOTION for Leave of Absence as to USA For dates of: July 12 through 16, 2010. Responses due by 6/24/2010 (Rhodes, Patricia) (Entered: 06/11/2010)
6/14/10	64	ORDER granting Patricia Rhodes' 63 Motion for Leave of Absence as to Anthony Davila (1). Signed by Judge J. Randal Hall on 6/14/10. (aeh) (Entered: 06/14/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
6/14/10	65	MOTION for Leave of Absence as to USA For dates of: August 2 through 6, 2010. Responses due by 6/28/2010 (Rhodes, Patricia) (Entered: 06/14/2010)
6/17/10	66	ORDER granting 65 Motion for Leave of Absence to Patricia Rhodes for August 2-August 6, 2010. Signed by Judge J. Randal Hall on 6/17/10. (ljf) (Entered: 06/18/2010)
7/27/10	67	MOTION for Termination of Counsel and for Ex Parte Hearing by Anthony Davila. Responses due by 8/9/2010 REFERRED to Judge W. Leon Barfield. (aeh). Added MOTION for Hearing on 9/14/2010 (ljf). (Entered: 07/27/2010)
7/27/10	68	NOTICE OF HEARING ON MOTION in case as to Anthony Davila 67 MOTION for Termination of Counsel and for Ex Parte Hearing: Motion Hearing set for 8/3/2010 10:30 AM in Augusta-1st Floor before Magistrate Judge W. Leon Barfield. (lcw) (Entered: 07/27/2010)
8/3/10	69	Minute Entry for proceedings held before Magistrate Judge W. Leon Barfield: Motion Hearing as to Anthony Davila held on 8/3/2010 re

DATE	DOCKET NUMBER	PROCEEDINGS
		67 MOTION for Termination of Counsel and for Ex Parte Hearing filed by Anthony Davila. Hearing continued until PSI has been published. (Court Reporter FTR.) (lcw) (Entered: 08/03/2010)
8/4/10	70	BRIEF in support of 67 Motion by Anthony Davila (aeh) Modified on 8/4/2010 (aeh). (Entered: 08/04/2010)
8/27/10	71	MOTION for Leave of Absence as to Anthony Davila For dates of: August 30-September 3, 2010. Responses due by 9/9/2010 (Loebl, Michael) (Entered: 08/27/2010)
8/27/10	72	ORDER allowing psychiatric evaluation be made available to the United States Probation Office as to Anthony Davila. Signed by Judge J. Randal Hall on 8/27/10. (aeh) (Entered: 08/27/2010)
8/30/10	73	ORDER granting Michael N. Loebl's 71 Motion for Leave of Absence for the period of August 30-September 3, 2010 as to Anthony Davila (1). Signed by Judge J. Randal Hall on 8/30/10. (aeh) (Entered: 08/30/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
9/7/10	74	MOTION for Extension of Time to 14 days after ruling by Anthony Davila. Responses due by 9/20/2010 (Attachments: # 1 Exhibit Letter from Probation Office) (Loebl, Michael) (Entered: 09/07/2010)
9/7/10	75	NOTICE OF HEARING as to Anthony Davila Ex Parte Hearing set for 9/9/2010 02:00 PM in Augusta 1st Floor before Magistrate Judge W. Leon Barfield. (lcw) (Entered: 09/07/2010)
9/7/10		Set/Reset Hearings as to Anthony Davila: Ex Parte Hearing has been rescheduled for 9/13/2010 11:00 AM in Augusta-1st Floor before Magistrate Judge W. Leon Barfield. (lcw) (Entered: 09/07/2010)
9/8/10	76	ORDER granting 74 Motion for Extension of Time as to Anthony Davila (1). Defendant is directed to submit any objections he may have to the PSI fourteen days from the Court's ruling on the defendant's motion to terminate counsel. Signed by Judge J. Randal Hall on 9/8/10. (aeh) (Entered: 09/08/2010)
9/14/10	77	EX PARTE ORDER granting [67-1] Motion as to Anthony Davila (1);

DATE	DOCKET NUMBER	PROCEEDINGS
		terminating [67-2] Motion for Hearing as to Anthony Davila (1). Signed by Magistrate Judge W. Leon Barfield on 9/14/10. (ljf) (ljf). (Entered: 09/14/2010)
9/15/10	79	MOTION invoking District Court's Supervisory Judicial Powers to Vacate the Plea and Dismiss the Indictment based on Government Misconduct by Anthony Davila. Responses due by 9/28/2010 (aeh) (Entered: 09/15/2010)
9/15/10	80	BRIEF and MEMORANDUM of Law in Support by Anthony Davila re 79 MOTION (aeh) (Entered: 09/15/2010)
9/17/10	81	MOTION to Produce Transcripts by Anthony Davila. Responses due by 9/30/2010 (aeh) (Entered: 09/17/2010)
9/20/10	82	MOTION for Extension of Time to File Objections to the Presentence Investigation Report by Anthony Davila. Responses due by 10/4/2010 (aeh) (Entered: 09/20/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
9/22/10	83	RESPONSE by USA as to Anthony Davila re 79 MOTION, 80 MEMORANDUM or RESPONSE in Support (Rhodes, Patricia) (Entered: 09/22/2010)
9/28/10	84	REPLY TO RESPONSE to Motion by Anthony Davila re 79 MOTION (aeh) (Entered: 09/28/2010)
10/7/10	85	ORDER granting 82 Motion for Extension of Time to File as to Anthony Davila (1). Defendant shall have until October 15, 2010 to file his objections to the presentence investigation report. Signed by Judge J. Randal Hall on 10/7/10. (aeh) (Entered: 10/07/2010)
10/14/10	86	OBJECTION TO PRESENTENCE INVESTIGATION REPORT by Anthony Davila (aeh) (Entered: 10/14/2010)
10/26/10	87	Defendant's Addendum MOTION to Vacate plea and dismiss the indictment based on additional prejudicial evidence by Anthony Davila. Responses due by 11/8/2010 (aeh) (Entered: 10/26/2010)
10/27/10	88	RESPONSE by USA as to Anthony Davila re 87 MOTION to Vacate

DATE	DOCKET NUMBER	PROCEEDINGS
		(Rhodes, Patricia) (Entered: 10/27/2010)
11/2/10	89	MOTION for In Camera Hearing by Anthony Davila. Responses due by 11/15/2010 (ljf) (Entered: 11/02/2010)
11/2/10	90	NOTICE OF HEARING ON MOTIONS in case as to Anthony Davila 79 MOTION, 87 MOTION to Vacate, 81 MOTION to Produce Transcripts, 89 MOTION for Hearing: Motions Hearing set for 11/12/2010 02:00 PM in Augusta - 2nd Floor before Judge J. Randal Hall. (jah) (Entered: 11/02/2010)
11/2/10	91	NOTICE OF HEARING as to Anthony Davila Sentencing set for 11/12/2010 02:00 PM in Augusta-2nd Floor before Judge J. Randal Hall. (jah) (Entered: 11/02/2010)
11/10/10	92	NOTICE OF RESCHEDULING OF HEARING ON MOTION in case as to Anthony Davila 79 MOTION invoking District Court's Supervisory Judicial Powers to vacate the Plea and dismiss indictment based on Government Misconduct, 87 MOTION to Vacate, 81 MOTION to Produce Transcripts, 89 MOTION

DATE	DOCKET NUMBER	PROCEEDINGS
		for Hearing:, NOTICE OF RE-SCHEDULING OF HEARING as to Anthony Davila Motion Hearing reset for 11/15/2010 10:00 AM in Augusta-2nd Floor before Judge J. Randal Hall. Sentencing reset for 11/15/2010 10:00 AM in Augusta-2nd Floor before Judge J. Randal Hall. (jah) (Entered: 11/10/2010)
11/15/10	93	Minute Entry for proceedings held before Judge J. Randal Hall: Motion Hearing as to Anthony Davila held on 11/15/2010 re 87 MOTION to Vacate filed by Anthony Davila, 79 MOTION invoking District Court's Supervisory Judicial Powers to vacate the Plea and dismiss indictment based on Government Misconduct filed by Anthony Davila, 81 MOTION to Produce Transcripts filed by Anthony Davila, 89 MOTION for Hearing filed by Anthony Davila. Motions were denied by the Court. (Court Reporter Rhea Rangel.) (jah) (Entered: 11/15/2010)
11/15/10		ORAL ORDER as to Anthony Davila re 89 MOTION for Hearing filed by Anthony Davila, 81 MOTION to Produce Transcripts filed by Anthony Davila, 87 MOTION to Vacate

DATE	DOCKET NUMBER	PROCEEDINGS
		filed by Anthony Davila, 79 MOTION invoking District Court's Supervisory Judicial Powers to vacate the Plea and dismiss indictment based on Government Misconduct filed by Anthony Davila; motions were denied from the bench during hearing. Signed by Judge J. Randal Hall on 11/15/10. (jah) (Entered: 11/15/2010)
11/15/10	94	Minute Entry for proceedings held before Judge J. Randal Hall: Sentencing held on 11/15/2010 for Anthony Davila (1), Count(s) 1, Custody of BOP-115 months; Supervised Release-3 years; Special Assessment-$100.00; Fine-None; Restitution-$423,530.63; Count(s) 2-12, 13-23, 24-34 Dismissed. (Court Reporter Rhea Rangel.) (jah) (Entered: 11/15/2010)
11/15/10	96	NOTICE OF APPEAL by Anthony Davila re 95 Judgment, (aeh) (Entered: 11/17/2010)
11/15/10	97	MOTION to Appoint Counsel by Anthony Davila. Responses due by 11/29/2010 (aeh) (Entered: 11/17/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
11/16/10	95	JUDGMENT as to Anthony Davila (1), Count(s) 1, Custody of BOP-115 months; Supervised Release-3 years; Special Assessment-$100.00; Fine-None; Restitution $423,530.63; Count(s) 13-23, 2-12, 24-34, Dismissed. Signed by Judge J. Randal Hall on 11/16/10. (aeh) (Entered: 11/17/2010)
11/17/10	98	Transmission of Notice of Appeal and Docket Sheet as to Anthony Davila to US Court of Appeals re 96 Notice of Appeal-Final Judgment (aeh) (Entered: 11/17/2010)
11/17/10		TERMINATE CASE (aeh) (Entered: 11/17/2010)
11/30/10	99	MOTION to Withdraw as Attorney by Michael N. Loebl. by Anthony Davila. Responses due by 12/13/2010 (Loebl, Michael) (Entered: 11/30/2010)
11/30/10	100	USCA correspondence to Counsel re 96 Notice of Appeal-Final Judgment: (aeh) (Entered: 11/30/2010)
11/30/10	101	USCA correspondence to counsel re 96 Notice of Appeal-Final Judgment: (aeh) (Entered: 11/30/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
11/30/10	102	USCA Case Number as to Anthony Davila 10-15310-I for 96 Notice of Appeal-Final Judgment filed by Anthony Davila. (aeh) (Entered: 11/30/2010)
12/02/10	103	TRANSCRIPT REQUEST by Anthony Davila for proceedings held on 11/15/10; 8/3/10; 2/8/10; 9/13/10; 2/24/10; 5/17/10; 6/1/09 before Judge Judge W. Leon Barfield and Judge J. Randal Hall, (aeh) (Entered: 12/02/2010)
12/03/10	105	ORDER authorizing preparation of transcript of 11/15/10 hearing as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 12/3/10. (aeh) (Entered: 12/03/2010)
12/3/10	106	ORDER authorizing preparation of transcript of 6/1/09 hearing as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 12/3/10. (aeh) (Entered: 12/03/2010)
12/3/10	107	ORDER authorizing preparation of transcript of 5/17/10 hearing as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 12/3/10. (aeh) (Entered: 12/03/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
12/3/10	108	ORDER authorizing preparation of transcript of 2/14/10 hearing as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 12/3/10. (aeh) (Entered: 12/03/2010)
12/3/10	109	ORDER authorizing preparation of transcript of 9/13/10 hearing as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 12/3/10. (aeh) (Entered: 12/03/2010)
12/3/10	110	ORDER authorizing preparation of transcript of 2/8/10 hearing as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 12/3/10. (aeh) (Entered: 12/03/2010)
12/3/10	111	ORDER authorizing preparation of transcript of 8/3/10 hearing as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 12/3/10. (aeh) (Entered: 12/03/2010)
12/3/10	112	ORDER authorizing preparation of transcript of 11/15/10 hearing as to Anthony Davila. Signed by Magistrate Judge W. Leon Barfield on 12/3/10. (aeh) (Entered: 12/03/2010)
12/10/10	113	Court reporter acknowledgment of transcript request as to Anthony Davila. Estimated filing date of

DATE	DOCKET NUMBER	PROCEEDINGS
		1/8/10 for transcripts of sentencing hearing, 11/15 hearing, and change of plea hearing 5/17. (aeh) (Entered: 12/10/2010)
12/10/10	114	ORDER denying 97 Motion to Appoint Counsel as to Anthony Davila (1); denying 99 Motion to Withdraw as Attorney. as to Anthony Davila (1). Signed by Judge J. Randal Hall on 12/10/10. (aeh) (Entered: 12/10/2010)
12/13/10	115	Transmittal of 12/10/10 Order by Judge Hall to US Court of Appeals re 96 Notice of Appeal-Final Judgment: (aeh) (Entered: 12/13/2010)
12/17/10	116	MOTION for Reconsideration re 114 Order on Motion to Appoint Counsel, Order on Motion to Withdraw as Attorney by Anthony Davila. Responses due by 12/30/2010 (aeh) (Entered: 12/17/2010)
12/20/10	117	ORDER denying 116 Motion for Reconsideration as to Anthony Davila (1). Signed by Judge J. Randal Hall on 12/20/10. (aeh) (Entered: 12/20/2010)
12/21/10	118	USCA received 12/10/10 Order re 96 Notice of Appeal-Final Judgment: (aeh) (Entered: 12/22/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
12/29/10	119	NOTICE OF APPEAL-OTHER ORDER by Anthony Davila re 117 Order on Motion for Reconsideration, 114 Order on Motion to Appoint Counsel, Order on Motion to Withdraw as Attorney. (aeh) (Entered: 12/29/2010)
12/29/10	120	Transmission of Notice of Appeal and Docket Sheet as to Anthony Davila to US Court of Appeals re 119 Notice of Appeal-Other Order (aeh) (Entered: 12/29/2010)
1/11/11	121	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Anthony Davila held on May 17, 2010, Change of Plea, before Judge Hall. Court Reporter/Transcriber Rhea Rangel, Telephone number 706-823-6468. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. (Transcript Redaction Policy Issued or Click here to view Transcript Redaction Policy) Redaction Request due 2/1/2011. Redacted Transcript

DATE	DOCKET NUMBER	PROCEEDINGS
		Deadline set for 2/11/2011. Release of Transcript Restriction set for 4/11/2011. (Rangel, Rhea) (Entered: 01/11/2011)
1/11/11	122	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Anthony Davila held on November 15, 2010, Motions and Sentenicng, before Judge Hall. Court Reporter/Transcriber Rhea Rangel, Telephone number 706-823-6468. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. (Transcript Redaction Policy Issued or Click here to view Transcript Redaction Policy) Redaction Request due 2/1/2011. Redacted Transcript Deadline set for 2/11/ 2011. Release of Transcript Restriction set for 4/11/2011. (Rangel, Rhea) (Entered: 01/11/2011)
1/14/11	123	NOTIFICATION BY COURT REPORTER THAT TRANSCRIPT HAS BEEN FILED as to Anthony Davila (aeh) (Entered: 01/14/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
1/14/11	124	CJA 24 as to Anthony Davila: Authorization to Pay Rhea Rangel $ 167.90 for Transcript,. Signed by Judge J. Randal Hall on 1/14/11. (aeh) (Entered: 01/14/2011)
1/14/11	125	CJA 24 as to Anthony Davila: Authorization to Pay Rhea Rangel $ 156.95 for Transcript,. Signed by Judge J. Randal Hall on 1/14/11. (aeh) (Entered: 01/14/2011)
1/18/11	126	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Arraignment Proceedings as to Anthony Davila held on June 1, 2009, before Judge W. Leon Barfield. Court Reporter/Transcriber C. Joan Mobley, Telephone number 912-280-1348. Tape Number: FTR. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. (Transcript Redaction Policy Issued or Click here to view Transcript Redaction Policy) Redaction Request due 2/8/2011. Redacted Transcript Deadline set for 2/18/2011. Release of Transcript Restriction set for 4/18/

DATE	DOCKET NUMBER	PROCEEDINGS
		2011. (Mobley, Joan) (Entered: 01/18/2011)
1/18/11	127	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (SEALED) of Proceedings as to Anthony Davila held on February 8, 2010, in Camera Hearing, before Judge W. Leon Barfield. Court Reporter/Transcriber C. Joan Mobley, Telephone number 912-280-1348. (Transcript Redaction Policy Issued or Click here to view Transcript Redaction Policy) Redaction Request due 2/8/2011. Redacted Transcript Deadline set for 2/18/2011. Release of Transcript Restriction set for 4/18/2011. (aeh) Modified security on 1/18/2011 (aeh). (Entered: 01/18/2011)
1/18/11	128	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Anthony Davila held on February 23, 2010, Competency Hearing, before Judge W. Leon Barfield. Court Reporter/Transcriber C. Joan Mobley, Telephone number 912-280-1348. Document Sealed. (Transcript Redaction Policy Issued or Click here to view Transcript Redaction Policy) Redaction Request due 2/8/2011. Redacted Transcript

DATE	DOCKET NUMBER	PROCEEDINGS
		Deadline set for 2/18/2011. Release of Transcript Restriction set for 4/18/2011. (aeh) (Entered: 01/18/2011)
1/18/11	129	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (SEALED) of Proceedings as to Anthony Davila held on August 3, 2010 before Judge W. Leon Barfield. Court Reporter/Transcriber C. Joan Mobley, Telephone number 912-280-1348. (Transcript Redaction Policy Issued or Click here to view Transcript Redaction Policy) Redaction Request due 2/8/2011. Redacted Transcript Deadline set for 2/18/2011. Release of Transcript Restriction set for 4/18/2011. (aeh) Modified on 1/18/2011 (aeh). (Entered: 01/18/2011)
1/18/11	130	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (SEALED) of Proceedings as to Anthony Davila held on September 13, 2010 before Judge W. Leon Barfield. Court Reporter/Transcriber C. Joan Mobley, Telephone number 912-280-1348. (Transcript Redaction Policy Issued or Click here to view Transcript Redaction Policy) Redaction Request due 2/8/2011. Redacted Transcript Deadline set for 2/18/2011. Release

DATE	DOCKET NUMBER	PROCEEDINGS
		of Transcript Restriction set for 4/18/2011. (aeh) Modified on 1/18/2011 (aeh). (Entered: 01/18/2011)
1/19/11	131	NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED re 96 Notice of Appeal-Final Judgment: (slt) (Entered: 01/19/2011)
1/25/11	132	CJA 24 as to Anthony Davila: Authorization to Pay C. Joan Mobley $ 65.70 for Transcript,. Signed by Judge J. Randal Hall on 1/24/11. (aeh) (Entered: 01/25/2011)
1/25/11	133	CJA 24 as to Anthony Davila: Authorization to Pay C. Joan Mobley $ 54.75 for Transcript,. Signed by Judge J. Randal Hall on 1/24/11. (aeh) (Entered: 01/25/2011)
1/25/11	134	CJA 24 as to Anthony Davila: Authorization to Pay C. Joan Mobley $ 36.50 for Transcript,. Signed by Judge J. Randal Hall on 1/24/11. (aeh) (Entered: 01/25/2011)
1/25/11	135	CJA 24 as to Anthony Davila: Authorization to Pay C. Joan Mobley $ 193.45 for Transcript,. Signed by Judge J. Randal Hall on 1/24/11. (aeh) (Entered: 01/25/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
1/25/11	136	CJA 24 as to Anthony Davila: Authorization to Pay C. Joan Mobley $ 102.20 for Transcript,. Signed by Judge J. Randal Hall on 1/24/11. (aeh) (Entered: 01/25/2011)
2/8/11	137	ORDER of USCA (certified copy) Denying appellant's motion for appointment of counsel; denying counsel's motion to withdraw; denying appellant's motion to stay as to Anthony Davila re 96 Notice of Appeal Final Judgment (aeh) (Entered: 02/08/2011)
2/17/11	138	USCA correspondence to counsel re 96 Notice of Appeal-Final Judgment: (aeh) (Entered: 02/17/2011)
2/17/11	139	USCA correspondence to counsel concerning appointment re 96 Notice of Appeal-Final Judgment: (aeh) (Entered: 02/17/2011)
4/19/11	140	CERTIFICATE OF READINESS as to Anthony Davila re 96 Notice of Appeal-Final Judgment filed by Anthony Davila (aeh) (Entered: 04/19/2011)
4/19/11	141	Certified and Transmitted Record on Appeal as to Anthony Davila to US Court of Appeals re 96 Notice of

DATE	DOCKET NUMBER	PROCEEDINGS
		Appeal-Final Judgment (aeh) (Entered: 04/19/2011)
4/20/11	142	ORDER allowing transmittal of sealed documents 38, 127, 128, 129, and 130 to 11th Circuit Court of Appeals as to Anthony Davila. Signed by Judge J. Randal Hall on 4/20/11. (aeh) (Entered: 04/20/2011)
4/27/11	143	CJA 20 as to Anthony Davila: Authorization to Pay Michael N. Loebl. Amount: $ 12490.59, with Memorandum. Signed by Judge J. Randal Hall on 4/26/11. (aeh) (Entered: 04/27/2011)
5/2/11	144	Return Receipt: USCA received record on appeal re 96 Notice of Appeal-Final Judgment: (aeh) (Entered: 05/02/2011)
12/23/11	145	Appeal Opinion re 96 Notice of Appeal-Final Judgment: Conviction is Vacated and the case is remanded with instructions. (aeh) (Additional attachment(s) added on 1/4/2012: #1 11th Circuit Memo) (aeh). Modified on 2/8/2012 (jah). (Entered: 12/23/2011)
1/4/12	146	ORDER reassigning the case to the Honorable Dudley H. Bowen, Jr., for plenary disposition. Magistrate

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge G.R. Smith will perform the duties of Magistrate Judge as to Anthony Davila re 145 Appeal Opinion. Signed by Chief Judge Lisa G. Wood on 1/3/2012. (order was mailed to Defendant at Federal Prison, McDuffie CDC, Thomson, GA) (ca) (Entered: 01/04/2012)
1/4/12		Case as to Anthony Davila Reassigned to Honorable Dudley H. Bowen, Jr. to Judge Dudley H. Bowen and Magistrate Judge G. R. Smith. Judge J. Randal Hall, Magistrate Judge W. Leon Barfield no longer assigned to the case., Case reopened as to Anthony Davila (ca) (Entered: 01/04/2012)
2/1/12	147	Order dated 1/3/12, return to sender; unable to forward as to Anthony Davila. Mail was sent to McDuffie County Detention Center, P.O. Box 360, Thomson, GA 30824. (ca) (Entered: 02/01/2012)
4/24/12	148	MANDATE of USCA as to Anthony Davila re 96 Notice of Appeal-Final Judgment, 119 Notice of Appeal-Other Order. Conviction is vacated and remanded with instructions. (aeh) Modified on 4/30/2012 (aeh). (Entered: 04/24/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
4/24/12	149	ORDER making the Mandate of the Eleventh Circuit the judgment of this Court. Defendant's Not Guilty plea is reinstated and counsel is to be appointed as to Anthony Davila re 148 USCA Mandate. Signed by Judge Dudley H. Bowen on 4/24/12. (aeh) Modified on 4/30/2012 (aeh). (Entered: 04/24/2012)
4/25/12		Appeal Record Returned as to Anthony Davila: 10-15310-DD; 11-10224-DD (dhh) (Entered: 04/25/2012)
5/1/12	150	Order Terminating Attorney in case as to Anthony Davila; representation by attorney Michael N. Loebl terminated, added attorney James Pete Theodocion for Anthony Davila. Signed by Judge Dudley H. Bowen on 5/1/2012. (jg) (Entered: 05/01/2012)
5/2/12	151	CJA 20 as to Anthony Davila: Appointment of Attorney James Pete Theodocion. Signed by Judge Dudley H. Bowen on 5/1/2012. (jg) (Entered: 05/02/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
5/2/12	152	Writ of Habeas Corpus ad Prosequendum Issued as to Anthony Davila for 5/24/2012 @ 10am. Signed by Judge Dudley H. Bowen on 5/2/2012. (jg) (Entered: 05/02/2012)
5/4/12	153	NOTICE OF ATTORNEY APPEARANCE David Mitchell Stewart appearing for USA. *Co-Counsel* (Stewart, David) (Entered: 05/04/2012)
5/4/12	154	MOTION for Leave of Absence as to USA For dates of: May 11; May 29 through June 1; June 6 through 8; June 27 through July 11, 2012. Responses due by 5/17/2012 (Attachments: #1 Text of Proposed Order) (Stewart, David) (Entered: 05/04/2012)
5/9/12	155	ORDER granting 154 Motion for Leave of Absence as to David Stewart. Signed by Judge Dudley H. Bowen on 5/9/2012. (jg) (Entered: 05/09/2012)
6/6/12	156	MOTION for Extension of Time to File Pretrial Motions by James Pete Theodocion as to Anthony Davila. Responses due by 6/21/2012 (Theodocion, James) (Entered: 06/06/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
6/6/12	157	ORDER granting 156 Motion for Extension of Time as to Anthony Davila (1). Signed by Judge Dudley H. Bowen on 6/6/2012. (dhh) (Entered: 06/06/2012)
6/6/12		Set/Reset Deadlines as to Anthony Davila: Motions due by 6/27/2012. (dhh) (Entered: 06/06/2012)
6/27/12	158	MOTION for Leave of Absence as to USA For dates of: Aug. 6-10, 2012. Responses due by 7/12/2012 (Attachments: #1 Text of Proposed Order) (Rhodes, Patricia) (Entered: 06/27/2012)
6/27/12	159	MOTION to Suppress *Custodial Statements of Defendant and Supporting Brief* by James Pete Theodocion as to Anthony Davila. Responses due by 7/12/2012 (Attachments: #1 Exhibit IRS Memorandum, #2 Exhibit IRS Memorandum, #3 Affidavit) (Theodocion, James) (Additional attachment(s) added on 6/28/2012: # 4 Exhibit IRS Memorandum Redacted version of attachment(1)) (dhh). Modified on 6/28/2012 (dhh). (Entered: 06/27/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
6/27/12	160	MOTION for Disclosure by James Pete Theodocion as to Anthony Davila. Responses due by 7/12/2012 (Theodocion, James) (Entered: 06/27/2012)
6/28/12		MOTIONS as to Anthony Davila REFERRED to Magistrate Judge: 160 MOTION for Disclosure, 159 MOTION to Suppress *Custodial Statements of Defendant and Supporting Brief.* (aeh) (Entered: 06/28/2012)
6/28/12	161	ORDER granting 158 Motion for Leave of Absence as to Patricia Green Rhodes for the Government. Signed by Magistrate Judge G. R. Smith on 6/28/2012. (mah) (Entered: 06/28/2012)
6/28/12	162	MOTION to Stay Proceeding and Exclude Time by Patricia Green Rhodes as to Anthony Davila. Responses due by 7/12/2012 (Attachments: #1 Exhibit, #2 Exhibit) (Rhodes, Patricia) Modified on 7/9/2012 (aeh). (Entered: 06/28/2012)
7/3/12	163	MOTION/NOTICE of Conflict of Interest by Anthony Davila. Responses due by 7/16/2012 (Attachments: #1 Affidavit, #2 Envelope)

DATE	DOCKET NUMBER	PROCEEDINGS
		REFERRED to Judge G. R. Smith. (dhh) (Entered: 07/05/2012)
7/12/12	164	RESPONSE in Opposition by USA as to Anthony Davila re 159 MOTION to Suppress *Custodial Statements of Defendant and Supporting Brief* (Rhodes, Patricia) (Entered: 07/12/2012)
7/12/12	165	RESPONSE in Opposition by USA as to Anthony Davila re 163 MOTION (Rhodes, Patricia) (Entered: 07/12/2012)
7/23/12	166	ORDERED that the Court declines to entertain Davila's request that the jury be advised of an alleged "conflict of interest" re 163 MOTION/ NOTICE of Conflict filed by Anthony Davila. Any further legal argument that Davila wishes to make should be brought to the attention of his attorney. Signed by Magistrate Judge G. R. Smith on 7/23/2012. (mah) (Entered: 07/23/2012)
7/30/12	167	Mail Returned as Undeliverable. Mail sent to Anthony Davila returned marked "Return to Sender -Unable to Forward" re 166 Order. (mah) (Entered: 07/31/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
8/13/12	168	MOTION for leave to file supplement to 162 Motion to Stay. Responses due by 8/27/2012. (Attachments: #1 Supplement) (Rhodes, Patricia) Modified on 8/22/2012 (aeh). (Entered: 08/13/2012)
10/30/12	169	ORDER granting 162 Motion to Stay, and granting 168 Motion for Leave to File as to Anthony Davila (1). Signed by Judge Dudley H. Bowen on 10/30/2012. (dhh) Modified on 11/20/2012 (dhh). (Entered: 10/30/2012)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
(AUGUSTA DIVISION)

Case No. 109-CR-060

UNITED STATES OF AMERICA

v.

ANTHONY DAVILA, DEFENDANT

Nov. 15, 2010
10:00 a.m.

MOTIONS AND SENTENCING

BEFORE THE
HONORABLE J. RANDAL HALL
United States District Judge

Appearances:

For the Government:

Patricia Rhodes, AUSA
United States Attorney's Office—Augusta
P.O. Box 2017
Augusta, Georgia 30903
(706) 724-0517

For the Defense:

Anthony Davila, Pro Se
Michael Loebl, Standby Counsel

Fulcher Hagler, LLP
P.O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Reported By:

Rhea Rangel, Official Court Reporter
Sounthern District of Georgia
P.o. Box 601
Clearwater, South Carolina 29822
(706) 823-6468

[3]

P-R-O-C-E-E-D-I-N-G-S

(Court was called to order at 10:00 a.m.)

THE CLERK: Good morning. This morning we're here to conduct a motions hearing and a sentencing in the case of *United States of America versus Anthony Davila*, Criminal Case Number CR109-060.

All parties are present and ready to proceed, your Honor.

THE COURT: Thank you, Mr. Howell.

The purpose for this morning's hearing was originally set as a sentencing. However, the Court notes that the defendant in this case has filed a number of motions that need to be disposed of prior to any sentencing in the case.

Specifically, the defendant has filed a Motion to Vacate his Guilty Plea and Dismiss the Indictment based

on government misconduct, which is Document Number 79.

Subsequently, the defendant produced a Motion to Produce Transcripts, Document 81. The defendant then filed an addendum Motion to Vacate Plea and Dismiss Indictment based on additional prejudicial evidence, Document Number 87, and a Motion for In Camera Inspection, Document 89.

The Court notes that the government has responded to both the defendant's original Motion to Vacate his Plea and his addendum Motion to Vacate the Plea.

The Court notes that the appearances today on behalf [4] of the government, Assistant United States Attorney Patricia Rhodes. The Court notes that the defendant is present and is appearing and proceeding pro se pursuant to an order issued by Magistrate Judge Leon Barfield on September 14 of 2010, which granted the defendant's earlier motion to terminate his court-appointed attorney, Mr. Michael Loebl, and found that the defendant had knowingly waived his right to proceed with counsel. The Court notes that Mr. Loebl was appointed standby counsel by Magistrate Judge Barfield, and that Mr. Loebl is present this morning serving in that role.

Mr. Davila, come to the lectern, please, sir. Since you are proceeding pro se this morning, I will direct my questions to you.

You have filed four motions, but the two that are the most significant for purposes of this morning were your

original Motion to Vacate your Plea and Dismiss the Indictment and then your addendum Motion to Vacate the Plea and Dismiss the Indictment based on additional prejudicial evidence. Now, Mr. Davila, I have reviewed your motions, your very lengthy motions, in detail. And I have reviewed the government's response to those motions. I have gone back and I have listened to the recording of the Rule 11 Proceeding that was conducted by this Court on May 17 of 2010.

So my question to you at this point, then, in support of these two motions to withdraw your plea or to vacate your [5] plea, do you have any information this morning that you wish to offer me, that is, in addition to what you have written in your motions and your responses to the government' responses to your motions?

THE DEFENDANT: Yes, sir.

THE COURT: What is that?

THE DEFENDANT: Your Honor, my decision to enter the plea was a strategic decision. The reason being is that I knew the prosecutor had a duty with the Courts to disclose all the information relevant for this Court's determination of the acceptance or rejection of the plea.

And what I'm talking about is the known factual basis that had the erroneous timeframes on it with a specific conduct on it. I'm not going to go into detail because I already explained that in my motion.

However, the problem that I had with it was that there was no knowledge of conduct except for what Jennifer Rodriguez told the agents as far as my conduct in the actual conspiracy. The problem with that is that they're using that as a basis to indict me under substantive offenses that I've not been indicted on in the Southern District of Georgia and the Middle District of Florida. And by using that specific conduct, that they have no knowledge of, it's going to automatically find me guilty in the Middle District of Florida.

Now, I couldn't have made this Court aware of what I [6] call a vindictive prosecution because there was only one way to do it, and that was by going forward with this plea, hoping that the prosecutor, at the time you were apprized at the Change of Plea hearing, when the timeframe issues came up to your attention and the lack of personal knowledge, I was hoping and praying that the prosecutor would have stepped up to the plate and informed the Court about all the information that was relevant to the Court for this Court to make a decision on whether or not to accept or reject the plea.

THE COURT: But why didn't you raise that? I gave you an opportunity to speak in that hearing. You never mentioned a word about this.

THE DEFENDANT: Your Honor, I was represented by counsel. Counsel assured me that I was not going to be facing perjury. And if you go back to the Change of Plea hearing transcripts, I was satisfied with my attorney's services up to that point in time.

When I confronted my attorney about the clarification of these timeframes, that it wasn't enough, and he refused to go forward on it, that's when I proceeded pro se, your Honor.

THE COURT: I understand. But it took you four months after your plea agreement—I mean after you signed the plea agreement, four months after you entered your guilty plea, coincidentally, after you saw your Presentence Investigation Report, it took you that amount of time to now decide to [7] clarify by filing a motion?

THE DEFENDANT: Yes, sir.

THE COURT: Why did you wait four months?

THE DEFENDANT: First of all, I didn't see my attorney until two months afterwards.

THE COURT: Well, I understand. But my point is, if you felt like that there were issues, one, you had an ample opportunity at the Rule 11 Proceeding to make the Court aware if you thought that there were—that the statements underlying your guilty plea were false. I mean, you've alleged perjury. I have no evidence of perjury.

But my point is that you then waited four months to make known these important facts. And after you saw your Presentence Investigation Report, you saw that the guideline calculation as to the amount of time that you were facing—

THE DEFENDANT: Your Honor—

THE COURT: Is it just a coincidence?

THE DEFENDANT: No, it's not a coincidence. As a matter of fact, it was a strategic decision because I knew that once this information was brought up to the Courts, that the prosecutor had a duty, your Honor. It wasn't my duty. They're the ones that have to clarify to the Court whether there's information that's inaccurate or not. They knew at the detention hearing in June 9, 2009, that there was something wrong with the timeframe and the lack of personal knowledge. I [8] had no choice. I had no choice but to expect—

THE COURT: You did have a choice. If you felt like there were errors with the timeframe, you could have gone to trial.

THE DEFENDANT: I did the strategic decision of allowing them to go forward with the truth, your Honor. I understand—as I understand, the way *Basurto* reads, it's not my duty. It was her duty.

THE COURT: But you signed a plea agreement that admitted to those facts.

THE DEFENDANT: I told my attorney—I told my attorney that I wanted to make sure I did not perjure myself. He assured me that it was not going to happen.

THE COURT: Signing the plea agreement doesn't entitle you to commit perjury. You signed a plea agreement.

If you remember at that Rule 11 Proceeding, I asked you: Did you sign this plea agreement?

You responded yes.

I asked you: Did you read it and discuss it with your lawyer before you signed?

You responded yes.

I then asked you: Do you understand that by signing the plea agreement, you are agreeing, one, to be bound by the terms of the plea agreement and, two, that all of the facts that are set forth in the plea agreement are true and accurate?

[9] You responded yes.

Now, tell me where I am mistaken in any of those responses.

THE DEFENDANT: When I read to the Court at the Change of Plea hearing and I talked about the inaccurate timeframes, nobody said anything about it. Nobody said anything about what is going on with these timeframes.

I read it to the Court at the Change of Plea hearing. I was telling the Court, at that point in time, that there was something wrong with the timeframes.

THE COURT: I understand. But your argument seems to be the effect of this on your sentence and not on your guilt or innocence. You've admitted that you committed this crime.

THE DEFENDANT: A conspiracy happened in May 2007, which I've held all along with my attorney, and I've fought with him nail and tooth about it, your Honor. I'm trying to say he assured me that everything was going to be fine. But what happened was now I'm exposed to substantive offenses in the Middle District of Florida based on those false statements.

THE COURT: Well, but you understand, Mr. Davila, I'm concerned about the case in the Southern District of Georgia and the guilty plea that you entered in the Southern District of Georgia. Whatever you have going on in the Middle District of Florida is between you and the Middle District of Florida.

THE DEFENDANT: But it relates to this plea and the [10] conduct, your Honor.

THE COURT: Well, it may relate, but you've already pled guilty in the Southern District of Georgia. And I remind you that under the Federal Rule of Criminal Procedure 11, that you may withdraw that plea prior to sentencing only if you can show a fair and just reason.

So what I'm trying to find out is what you contend is a fair and just reason when you were given ample opportunity in that Rule 11 Proceeding. The Court made a finding that your plea was knowing, voluntary, not the result of any coercion, not the result of any promises other than the promises the government may have made in the plea agreement. You confirmed all that.

I then asked you: Knowing all of that, do you still want to plead guilty to Count One, conspiracy?

You said yes.

Now, tell me what is a fair and just reason for you withdrawing, if, in fact, we went through a detailed conversation at your Rule 11 and the Court found that you were pleading knowingly and voluntarily.

THE DEFENDANT: Your Honor, I was misinformed by my counsel. Had he informed me that the plea agreement was going to be used for the basis of my substantive operative charges down in the Middle District of Florida, I would have not signed that plea.

[11] THE COURT: He may not have known that.

THE DEFENDANT: He knew that because we were talking about it, but he never expressed that to me.

THE COURT: I understand. But your decision to sign that plea agreement dealt with your guilt or innocence in the Southern District of Georgia on these charges.

THE DEFENDANT: Based on misinformation, your Honor. Please, I urge the Court to understand that. It was based on misinformation. Had I known -- had I known that it was going to effect me substantively in the Middle District of Florida, I would have never taken that plea, your Honor.

THE COURT: Well, I understand. But I don't think that's the issue before the Court, Mr. Davila. Thank you.

Ms. Rhodes, would you like to respond?

MS. RHODES: I would very briefly, your Honor.

THE COURT: I've read your responses, and I will certainly permit you to respond to what's been said this morning.

MS. RHODES: We would rely on the responses that we've previously filed. But I do want to just clarify a couple of points for the record.

THE COURT: Yes.

MS. RHODES: First of all, Mr. Davila has made an issue about his potentially being charged with perjury. Clearly, we're not going to charge perjury in a case where [12] we're talking about the dates of the indictment, which are immaterial, which is a requirement of perjury, because the law is clear that a variance in the dates of the indictment do not provide a basis for perjury. And it's just that. It is a variance which the government is allowed to allege dates that encompass any time during the statute of limitations so long as we don't charge conduct occurring after the fact, which is exactly what happened here.

Secondly, I want to point out the timing of this motion and its—and why this is a motion that should be dismissed based on the filing—the timing of its filing.

That is, pursuant to Rule 12, the criminal—Federal Rules of Criminal Procedure, this is the type of motion, a Motion to Dismiss an Indictment or Vacate—it's not to vacate a plea. This is a Motion to Dismiss the Indictment.

It has to be filed pretrial for the very reason of what we are going through today. That is, we can't let—we cannot permit, and the rules provide that we should not permit, defendants to proceed through their plea hearing and then decide to file a Motion to Dismiss the Indictment so that we all come back here and just redo the case all over again. That's why the Rule provides that this type of motion should have been filed prior to trial. And because of that alone, his motion should be dismissed based on that basis.

But moving past that and to the point of viewing this [13] as a Motion to Vacate his Guilty Plea, it's clear, based on everything we've seen through his mental evaluation up through today here in court, that he is very competent and that he entered this plea, when you go back and listen to the Rule 11, voluntarily of his own free will. And there is no just reason for him to now be allowed to withdraw this guilty plea.

As far as all of the conduct that is attributed to him in this Presentence Report and how that correlates and corresponds to what is happening down in the Middle District of Georgia, I want the Court to be very clear what has gone on here, because this defendant is basically trying to let the Court know about the facts he wants the Court to know about but not all of the facts.

And, that is, when Mr. Davila was negotiating this guilty plea with the government through his lawyer and that was—it was fine the way this worked, but he insisted upon having a proffer letter from the Middle District of Florida before he would enter a guilty plea. We went through the motions to secure a proffer letter from the Middle District of Florida so that he could provide information in the prosecution of his ex-wife down in Florida that would encompass the relative conduct that is attributed to him here.

We got the proffer letter from the AUSA down in the Middle District. It was passed onto the agents. He even insisted that he would not speak to the agents from the [14] Southern District of Georgia. We had secured a situation where agents from the IRS out of Florida were going to come and interview him, and he put the brakes on that. Judge, we're not required to do any of that, and we did that for him. But Mr. Davila is the one who has decided he does not want to cooperate.

As the Court has pointed out, we have no control over what another District will do. I have no indication from anyone in the Middle District that he is going to be prosecuted for these crimes because he has been prosecuted in the Southern District and all of this relevant conduct, we are hoping, should we reach the sentencing phase, will be held against him because it is relevant conduct in this case. And we can discuss that at sentencing, if we get that far.

But the point is that there is no prohibition to the Middle District of Florida on prosecuting him. Howev-

er, I don't know that they intend to do that if all of the relevant conduct is held against him in this case.

I do believe there may be some prohibition—I'm looking to the probation office for confirmation that if the relevant conduct is—I don't know if they can attribute him with the same relevant conduct if it's attributed to him in this case. But I'm not sure about that. That would be something that would be taken up if that were to arise, although I have no indication that it will.

[15] MR. DALLAS: If it does, your Honor, it would be a concurrent sentence situation, if he's already been attributed that in this District.

THE COURT: Okay.

MS. RHODES: I think that the written responses we have filed, along with any comments today, address the issues that were raised in this—in the defendant's motion. But basically, now that he has entered a guilty plea, he waives any factual defects or non-jurisdictional defects, which is what a variance in the dates are. So we would ask the Court to dismiss these indictments—excuse—dismiss his motions and proceed into sentencing.

THE COURT: Very well. All right. Then presently before the Court is the defendant's Motion to Vacate the Plea and Dismiss Indictment Based on Government Misconduct, Document Number 79, and the defendant's Addendum Motion to Vacate Plea and Dismiss Indictment Based on Additional Prejudicial Evidence, Doc-

ument Number 87. There were two related motions, Document 81, a Motion to Produce Transcripts, and a Motion for In Camera Inspection, Document 89.

As the Court noted in its opening remarks, the government did respond to the Motion to Vacate and the addendum motion filed by the defendant.

As to the portion of the defendant's Motion to Dismiss the Indictment, the government—the Court, rather, [16] agrees with the government's argument in this case that that motion is untimely, particularly following a guilty plea in this particular case. And, therefore, the portion of that motion and the addendum motion that dealt with defendant's request to dismiss the indictment is denied due to untimeliness.

As to the defendant's Motion to Vacate his Guilty Plea, again, the Court is operating under the standard set forth in Federal Rule of Criminal Procedure, Rule 11(d)(2)(A) which provides that the defendant may withdraw his plea if he can show— he or she can show a fair and just reason for withdrawing the plea.

The Court notes that at the May 17, 2010 proceeding conducted under Rule 11 that the defendant entered a plea of guilty to Count One of the indictment, which was the conspiracy charge.

The Court notes that, prior to that hearing and throughout that hearing, the defendant had the assistance of appointed legal counsel, Mr. Michael Loebl, who the Court noted was present this morning as standby counsel, even though he has been dismissed as

counsel in accordance with and in response to the defendant's Motion to Terminate Counsel.

The Court also has examined the length of the delay between the entry of plea and the defendant's Motion to Vacate, which was approximately four months. The Court finds that a [17] significant fact in that it suggests that—and the Court further notes that that motion was filed after the initial Presentence Report was prepared and distributed, which suggests a motive, potential motive, by the defendant to avoid a potential lengthy sentence, as reflected under the proposed calculation of the Sentencing Guidelines.

The Court notes that the defendant has failed to provide any new evidence of government misconduct or, actually, any evidence of government misconduct. The defendant's allegations regarding the timeframe in the indictment were not material. Clearly, at the Rule 11 Proceeding, the defendant admitted and acknowledged the elements of the conspiracy crime and admitted and acknowledged that his conduct would satisfy the elements of the crime.

In addition, the Court notes that at the Rule 11 proceeding, the plea was offered under oath. The defendant was asked questions regarding pressure, threats, or promises, other than the promises made by the government in the plea agreement, in order to obtain a guilty plea. The defendant responded that there were no pressure, threats, or promises, other than promises by the government in the plea agreement.

Again, the Court notes that throughout the course of that hearing, the defendant was represented by appointed counsel. The defendant then was permitted to make a statement or to testify. He did, as to his criminal conduct.

[18] The defendant was advised of his constitutional rights at that hearing. The defendant was advised of the consequences of his plea, including the waiver of the jury trial and the release of defenses. In addition, the defendant was advised of the statutory penalties that would—he would be subject to upon a conviction of the conspiracy crime.

The Court notes that the defendant, after being advised of his rights, of the consequences of the plea, stated his desire to plead guilty to Count One of the indictment. The Court further notes that the defendant entered into a plea agreement. And in that plea agreement, the facts which are now in dispute were very clearly stated.

The Court further finds that at the Rule 11 Proceeding, the defendant indicated that he had read the plea agreement, that he had discussed the plea agreement with his counsel. He further admitted to the Court that by signing the plea agreement he understood he would be bound by its terms. And, specifically, that any facts stated in the plea agreement were true and correct. Again, those facts being those that the defendant has placed into dispute under these motions and in court today.

Based upon these findings, it is clear to the Court that the entry of the guilty plea at the Rule 11 Proceeding on May 17th of this year was knowing and voluntary.

The Court further finds that it was made by defendant [19] with the assistance of counsel, and that the length of delay between the filing of the Motion to Withdraw and the guilty plea was such, and the timing of that following the issuance of the PSI report, were such that the defendant's motives appear to the Court to be more directed toward the severity of his potential sentence rather than any perjury or misconduct by the government. Again, which there is no evidence provided by the defendant or before the Court in any fashion to suggest that that occurred.

Therefore, the Court can find no fair and just reason for permitting the defendant to withdraw his guilty plea, and his Motions are hereby denied. In addition, the two related motions, Document 81 and 89, are terminated as moot based upon the Court's rulings on these two motions.

Now, with the denial of the Motion to Withdraw the Guilty Plea, Mr. Davila, if you will come to the lectern, we will now proceed into the sentencing portion of this hearing.

MR. LOEBL: Your Honor, at Mr. Davila's request, I will assist in this matter.

THE COURT: Very well.

Anthony Davila appeared before this Court on May 17, 2010, accompanied by his attorney at that time, Mr. Michael N. Loebl, for a Rule 11 proceeding. The Court notes that the defendant has since filed a motion to represent himself, which has been granted.

[20] Therefore, the defendant this morning is proceeding pro se. However, Mr. Loebl has been appointed by the Court to serve as standby counsel, and he is standing with the defendant at the lectern for the purpose of serving in that role.

Now, pursuant to a plea agreement, the defendant pled guilty and was adjudged guilty of Count One of the indictment charging him with conspiracy to defraud the government with respect to false individual federal income tax returns in violation of 18 United States Code Section 286.

* * * * *

[36] * * *

THE COURT: Okay. Thank you.

All right. The Court will then hereby adopt the statements, factual statements, set forth in the Presentence [37] Report as its findings of fact in this case, as supplemented by the Court's findings on these objections.

Furthermore, as supplemented by the Court's findings on the objections, the Court concurs with all of the findings by the probation office in the Presentence

Investigation Report, including the addendum, and adopts those findings as the Court's findings and hereby determines that the appropriate applicable guidelines, advisory guidelines, for the purposes—well, let me back up a minute.

I do note, before I announce the offense level, that this offense level reflected in the Presentence Report is based upon a full three-point reduction for acceptance of responsibility under Sentencing Guideline 3E1.1 (a) and (b).

Is the government moving for the third point, Ms. Rhodes?

MS. RHODES: Yes, your Honor, we are.

THE COURT: Very well.

Then I will grant that motion and, in reliance on that three-point reduction, will announce the following guidelines that are applicable for this morning's sentencing:

Total Offense Level 23; Criminal History Category VI; 92 to 115 months imprisonment; two to three years supervised release; $10,000 to $100,000 fine; $423,530.63 in restitution; and a $100 special assessment.

* * * * *

[39] * * *

THE COURT: Mr. Davila, before I impose sentence, let me just state that I'm not sure I agree totally with the government's argument in terms of your sentence, because I want to make you aware of the fact that you certainly have the right to vigorously defend any charges that are brought against you. I would expect nothing less from a defendant.

I granted the government's motion for the third-point reduction, for the acceptance of responsibility. You admitted to the crime of conspiracy under Count One. You did that in the Rule 11 Proceeding, and in some of your statements this morning you've admitted likewise. So that's not really a factor for me in looking at the appropriate sentence today.

What is significant to me in looking at this particular case is what I find to be nothing less than a remarkable, and I don't use that in a positive or complimentary sense, a remarkable record of criminal activity.

I know in one of your motions you point out to the Court in a respectful way that this was—and I'm using my words, not yours—this is not your first rodeo. And, clearly, it is not your first rodeo. It's interesting to me [40] that so much of the crimes that you've committed is essentially traveling around, in the most part, Hillsborough County, Florida, not with a gun robbing businesses, but with a checkbook.

It's just remarkable how many times that you did that and were convicted. And in many cases, violations of probation. A lot of your crimes were committed while on probation. You are a master at theft and deception and fraud and stealing.

And as a result, you had a subtotal Criminal History score of 25. Of course, that was enhanced because the incident offense was committed less that two years following your release from custody. So a 27, pretty high. A Criminal Category of VI.

You—you're on the walk of fame in the Federal Court in terms of your criminal activity. So that is critical to me. It's also critical to me that you took advantage of inmates that are incarcerated and who, essentially, had no way of determining or very little opportunity to determine that they were, in fact, the victim of a crime.

It's somewhat hard to be sympathetic for incarcerated criminals in many cases. But in this case the Court is sympathetic to their plight in that they were victimized without their knowledge of it or the right to resist.

In addition, you've chosen to use your criminal 41 skills in order to, in essence, steal over $400,000 from the people of the United States, from the taxpayers of the United States of America, through defrauding the Internal Revenue Service.

So I want you to be aware that there are a number of factors that the Court looks at in determining your final sentence, none of which have to do with the fact that

you have vigorously defended your case, that you have filed objections to the Presentence Investigation Report, or that you filed these motions to withdraw your plea. Because that, in fact, was not—those items were not factored in.

I have listened to the defendant's standby counsel in that the defendant has elected not to make a statement in this particular case. I have reviewed the Presentence Report. I have also considered the factors set forth at 18 United States Code Section 3553(a). Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Anthony Davila, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 115 months.

The Court finds no reason to depart from the sentence called for by application of the Advisory Guidelines, inasmuch as the facts as found are of the kind contemplated by the Sentencing Commission.

Restitution is due in the amount of at least 423,530.63 to the Internal Revenue Service. However, the 42 economic circumstances of this defendant do not allow for payment of the full amount of restitution ordered under any reasonable schedule of payments now or in the foreseeable future. Pursuant to 18 United States Code Section 3664(f)(3)(B), nominal payments of either quarterly installments of a minimum of $25 if working non-UNICOR or a minimum of 50 percent of monthly earnings if working UNICOR shall be made.

Upon release from prisonment or while on supervised release, nominal payments of a minimum of $150 per month shall be made. Payments are to be made payable to the clerk, United States District Court, for disbursement to the victim.

The Court has determined that the defendant does not have the ability to pay a fine. It is ordered that the defendant shall pay to the United States a special assessment of $100 which shall be due immediately.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. While on supervised release, he shall comply with the standard conditions of supervision adopted by this Court and the mandatory conditions required by 18 United States Code Section 3583, which will include, but not be limited to, urine testing, a prohibition against the possession of any firearm or any other dangerous weapon, and a prohibition against the violation of any law.

[43] Further, the defendant shall cooperate in the collection of a DNA sample as directed by the probation officer pursuant to 18 United States Code Section 3583.

The defendant shall participate in a program of testing for drug and alcohol abuse. And if the Court determines that it is necessary, he shall participate in a program of treatment for drug and alcohol abuse. Further, the defendant shall not tamper with any testing procedure.

It is recommended that the defendant be evaluated by Bureau of Prisons officials to establish his participation in an appropriate program of substance abuse treatment and counseling during his term of incarceration.

The defendant shall participate in a program of mental health treatment if the Court determines such program is necessary during his period of supervision.

The defendant shall provide the probation officer with access to any requested financial information. The defendant shall not incur any credit charges or open additional lines of credit without the approval of the probation officer unless he is in compliance with the installment payment schedule.

The defendant shall cooperate with the Internal Revenue Service in the payment of all outstanding taxes, interest, and penalties.

The defendant shall submit his person, residence, [44] office or vehicle to a search conducted by a United States probation officer at a reasonable time and in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

A curfew is imposed as a special condition of supervised release. The defendant shall not leave his residence from 10:00 p.m. until 6:00 a.m. daily during the

period of supervision, except when such leave is approved in advance by the probation officer. The probation officer is directed to provide the defendant with a written statement which sets forth all of the conditions to which the term of supervised release is subject.

The Court has accepted the plea agreement because it is satisfied that the agreement adequately reflects the seriousness of the actual offense behavior and that accepting the plea agreement will not undermine the statutory purposes of sentencing.

In accordance with the plea agreement, it is ordered that Counts 2 through 34 of the indictment be dismissed.

It is ordered that the defendant is remanded to the custody of the United States Marshal.

Pursuant to the plea agreement with limited [45] exceptions, the defendant has waived all rights conferred by 18 United States Code Section 3742 to appeal this sentence. The defendant has also waived the right to appeal this sentence on any other ground and has waived the right to attack the sentence in any post-conviction proceeding.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
(AUGUSTA DIVISION)

Case No. 109-CR-060

UNITED STATES OF AMERICA

v.

ANTHONY DAVILA, DEFENDANT

May 17, 2010
2:01 p.m.

RULE 11 HEARING/CHANGE OF PLEA

BEFORE THE
HONORABLE J. RANDAL HALL
United States District Judge

Appearances:

For the Government:

Patricia Rhodes, AUSA
United States Attorney's Office - Augusta
P.O. Box 2017
Augusta, Georgia 30903
(706) 724-0517

For the Defense:

Michael Loebl, Esquire

Fulcher Hagler, LLP
P.O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Reported By:

Rhea Rangel, Official Court Reporter
Southern District of Georgia
P.o. Box 601
Clearwater, South Carolina 29822
(706) 823-6468

* * * * *

[3]

P-R-O-C-E-E-D-I-N-G-S

(Court was called to order at 2:01 p.m.)

THE CLERK: Good afternoon. This afternoon we're here to conduct a Change of Plea hearing in the case of *United States of America versus Anthony Davila*, Criminal Action Number CR109-060.

All parties are present and ready to proceed, your Honor.

THE COURT: Good afternoon, everyone.

MR. LOEBL: Good afternoon, your Honor.

THE COURT: The Court will note the following appearances for the purpose of this afternoon's Rule 11 Proceedings:

On behalf of the United States Government, Assistant United States Attorney Patricia Rhodes. On behalf of the defendant, Mr. Mike Loebl.

And are you—is it Davila or Davila?

THE DEFENDANT: Davila, sir.

THE COURT: Davila. You are Anthony Davila?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Davila, I am Judge Hall. I am the United States District Judge for the Augusta Division. I will be presiding over your hearing this afternoon and, in all likelihood, will sentence you at a later date when that occurs.

Now, I want to make sure that you understand [4] everything that we talk about here today. So if you have any problems hearing or understanding anything that I say, I would ask that you interrupt me, and I will address that.

In addition, your attorney is with your today, and I would encourage you to rely upon his advice and counsel if that's what you need to do. So if you feel the necessity to speak to your attorney, by all means turn to him and do so. I will be glad to stop the hearing. And when you're ready to proceed then we will move right along. Is that okay?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the United States Grand Jury for the Southern District of Georgia has returned a multiple-count indictment against you that charges, in Count One, with conspiracy, a violation of 18 United States Code Section 286. Counts Two through Twelve charges you with false claims, violations of 18 United States Code Section 287. Counts 13 through 23 charge you with mail fraud, which is a violation of 18 United States Code Section 1341. And Counts 24 through 34 charge you with aggravated identity theft, a violation of 18 United States Code Section 1028.

Now, you have previously pled not guilty to these charges. I understand you are here today because you are seeking to plead guilty to Count One of the indictment, which is the conspiracy charge. Is that your understanding?

THE DEFENDANT: Yes, sir.

[5] THE COURT: Now, as it relates to this Count One conspiracy charge, the indictment charges as follows:

In the Southern District of Georgia and the Middle District of Florida, between January 1st, 2005, and December 31st, 2007, you caused to be filed with the Internal Revenue Service more than 120 false income tax returns in other individuals' names that together claimed over $630,000 in false, fictitious or fraudulent refunds.

That you received from the United States Department of Treasury more that $423,000 as a result of these false returns.

The Internal Revenue Service was, and is, an agency of the United States Department of Treasury responsible for administering and enforcing the tax laws of the United States.

For the tax years 2004, 2005, and 2006, you prepared and caused to be filed with the IRS false individual tax returns that contained one or more false statements.

Now, again, as it relates specifically to the issue of conspiracy, beginning on or about January 1st of 2005 through December 31 of 2007, in the Southern District of Georgia and the Middle District of Florida and elsewhere, you did combine, conspire, confederate and agreed with an unindicted coconspirator, J.R., to knowingly and willfully defraud the United States Department of Treasury by obtaining and attempting to obtain payment of false claims using the [6] following:

It was part of the conspiracy that you did use the Internet to search the Florida Department of Corrections web site and the web sites of other state prisons to identify inmates who were serving sentences which exceeded 15 years. It was further part of the conspiracy that you did record the names and case numbers of the inmates which you identified.

It was further part of the conspiracy that you did contact the county clerk's office which maintained the

case files of the inmates that you had selected, and that you did impersonate a law clerk in order to obtain access to these files.

It was further part of the conspiracy that using the clerk office files you did obtain the full names, birthdates, address and Social Security Numbers of the inmates you had selected.

Further, you did search the Florida Corporation web site for employer identification numbers of large corporations which you then used to create fictitious W-2 forms in the names of the inmates that you had selected.

It was further part of the conspiracy that you then used the fictitious W-2 forms and the fraudulently obtained data on the inmates to create fictitious 1040EZ tax forms.

Further, you did forge the signatures of the inmates on the 1040EZ forms and mail those forms to the IRS.

[7] A further part of the scheme that J.R. deposited certain other false and fictitious returns in the mails.

Further, that you set up multiple bank accounts in your own name into which more than $423,000 of fraudulently-obtained IRS tax refunds were deposited, this in violation of United States 18 Code Sections 286 and 2.

Now, do you clearly understand, not only what you've been charged with, but this specific Count One

conspiracy that you're now asking the Court to allow you to plead guilty to?

THE DEFENDANT: Yes, sir.

THE COURT: Have you seen a copy of this indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Have you gone over this indictment with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had an opportunity to talk to your attorney as much as you wish about these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Loebl, do you believe that your client understands the charges against him?

MR. LOEBL: Yes, your Honor. He understands the charges.

THE COURT: Okay. Now, Mr. Davila, I'm going to now ask the clerk to place you under oath, and then I'll explain to you what we'll do from this point forward.

[8] THE CLERK: Please raise your right hand.

DEFENDANT, ANTHONY DAVILA, SWORN.

THE CLERK: Please state your name for the record.

THE DEFENDANT: Anthony Davila.

QUESTIONS BY THE COURT

BY THE COURT:

Q Mr. Davila, you are now under oath. You should tell me the truth, because if you do not, you can be prosecuted for perjury and for making a false statement. If in fact you were to be prosecuted for either one of those offenses, any statements that you make under oath today in this hearing can be used against you. Do you understand that?

A Yes, sir.

Q Now, I am going to ask you a number of personal questions that will help me decide if you are competent to plead guilty, if you are able to understand what you are doing and why you are doing it. How old are you?

A I'm 45 years old, sir.

Q Are you a citizen of the United States?

A Yes, I am.

Q Are you married?

A Separated.

Q Do you have any children?

A Yes, I do.

Q How many?

[9] A Three.

Q How old are they?

A Seven, 10, and 21.

Q Before you were arrested, were you employed?

A Yes, sir.

Q Where?

A I had a loan modification self-employment business.

Q What was the name of that business?

A Let Me Modify Your Mortgage, LLC.

Q And where was it located?

A In Tampa, Florida, sir.

Q How long did you conduct that business?

A It was a continuing business from mortgage processing, so it's been since 2005. It just changed names in 2009.

Q What is the name now?

A Let Me Modify Your Mortgage.

Q Oh, Let Me Modify Your Mortgage. Okay. I see. How far did you go in school?

A College degree.

Q What college?

A Tampa Technical Institute.

Q What was that degree in?

A Associate's degree in computer science.

Q Can you read and write?

[10] A Yes, sir.

Q Have you used any drugs within the last month?

A No, sir.

Q Are you taking any prescription medication?

A Yes, sir.

Q What are you taking?

A I take Metformin for my diabetes. My blood pressure medication, I forgot the name of it. And then I take 600 milligrams of extended release Seroquel, psychotropic medication, sir.

Q And does that medication affect your ability to understand and to reason at all?

A Once I'm under the affect of it.

Q It—

A Once I'm under the affect of it.

Q It does affect you?

A Yes, sir.

Q Are you on it today?

A I'm okay today. Because I take it at 5:00 o'clock in the evening, so by 5:00 o'clock in the morning I'm okay.

Q You're okay?

A Yes, sir.

Q So do you clearly understand where you are and why you are here today?

A Yes, sir.

[11] THE COURT: Mr. Loebl, do you have any question about your client's competency to plead guilty today?

MR. LOEBL: No, your Honor.

BY THE COURT:

Q When is the last time you had any alcohol? Not within the last two or three days, I assume?

A No, sir.

Q Okay. I'm going to go over with you a number of rights that you have as an accused. I want you to listen very carefully because these are important rights that you have under our Constitution and federal law.

First, as you know, you have the right to a lawyer to assist you and to represent you during every stage of this case. As you know, or you may know, if at any time you cannot afford a lawyer, you are entitled to a free one. In this particular case, I believe that you represented to the magistrate that you did not have sufficient money to hire an attorney. As a result, Mr. Loebl was appointed to represent you. Is that correct?

A Yes, sir.

Q Are you satisfied with the assistance that you have received from Mr. Loebl so far in this case?

A So far, yes, sir.

Q Now, if you plead guilty today, you will be giving up your one chance to have a jury trial on these charges. You do [12] have the right to a speedy, public trial before a jury of 12 people selected from a cross-section of this community. You and your lawyer would participate in the jury selection and you would have the right to challenge potential jurors by the use of preemptory challenges.

Once selected, your jurors would promise under oath to try this case fairly and justly based only on the evidence submitted into trial and to the instructions on the law that I would give to them at a trial.

Now, I would tell the jury that you are presumed innocent, and that the presumption of innocence would remain with you throughout your trial unless at the end of that trial the prosecution had convinced the jury of your guilt beyond a reasonable doubt. I would also tell the jury that the presumption of innocence alone is enough for you to be acquitted. Any verdict by the jury would have to be unanimous, which means that all 12 would have to actually agree on the final verdict.

You have the right to be present during all stages of your case, particularly your trial. The prosecution would have to call its witnesses to testify under oath here in court. You would have the right to confront or to cross-examine those witnesses if you wish to do so. However, if you plead guilty today, you will be giving up your right to confront the prosecution's witnesses in this particular case.

[13] Now, the burden of proof would remain on the prosecution throughout your trial. You would not have to put on a defense or to produce any evidence whatsoever. However, if you wanted to, you certainly could produce evidence, and you could call witnesses to come to court to testify on your behalf. Now, if need be, the Court could issue subpoenas to require those witnesses to come to court to testify. And if you could not afford the cost of those subpoenas then the Court and the government would pay for those for you. The Court would.

You could also take the stand to testify in your own behalf. If you did that, the government would have the

right to cross-examine you. If you plead guilty, however, you will be giving up your right to present any defense to these charges. Do you understand that?

A Yes, sir.

Q Now, you would also have the right to remain silent, which means you would not have to testify. You would not have to say anything. If you decided to go to trial but not testify, the prosecution would not be allowed to say anything to the jury that would reflect negatively on your decision to remain silent. In addition, I would actually tell the jurors that they could not hold it against you if you decided to remain silent and not testify.

You would also have the right to appeal any [14] verdict that the jury may reach and the right to the assistance of a free lawyer for that appeal if you could not afford one.

If you plead guilty today, you will be giving up your right to a jury trial. You will be giving up your right to all of the trial-related rights that I have just described to you. You will essentially be giving up your right to raise any defense to the charges that the government has brought against you.

If you plead guilty, you will be found guilty based on your guilty plea just as though you had gone to trial and a jury had found you guilty. The bottom line is, if you plead guilty today, there will be no trial of any kind. Do you clearly understand that?

A Yes, sir.

Q Now, regarding this particular charge of conspiracy, if you were to go to trial and if the government were to be required to present a case against you, at the trial, in order to convict you of conspiracy, they would have to prove three elements of the crime.

First, they would have to prove that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan. And in this particular case, the plan that was charged in the indictment.

Second, that you, knowing the unlawful purpose of the plan, willfully joined in the plan.

[15] And, third, that the object of the unlawful plan was to defraud the government by obtaining the payment or allowance of a claim which is based on a false or fraudulent material fact. In this case, those were the fraudulent tax returns that you filed with the Internal Revenue Service.

Do you understand that these are the three elements that government would have to prove at trial in order to convict you of this crime?

A Yes, sir.

Q And, now, you know what your conduct was in this case. And now you know what the elements are. And you certainly acknowledge that these are the elements.

Are you now admitting to the Court that your conduct would satisfy these three elements?

A Your Honor, while it's true that monies obtained through the filing of false tax returns for tax year 2004, 2005, and 2006 were deposited into accounts that I owned and that I was aware of and participated in the preparation and filing of such returns, there are a couple of inaccuracies with respect to the testimony of Special Agent Hale on the detention hearing.

None of the inaccuracies concerning the details which I will explain momentarily change the fact that I am guilty of the elements of the conspiracy offense charged in Count One of the indictment. That said, I believe I need to [16] make the Court aware of two points.

First, the indictment alleges that the conspiracy with Jennifer Rodriguez occurred from approximately January 1st, 2005, and lasted through December 31st, 2007. I was in prison on a prior unrelated charge from approximately February 2003 through approximately mid-July of 2005. I did not meet Jennifer Rodriguez until the day of her 25th birthday on July 17th of 2006. While it is true that I was involved in the preparation and submission of fraudulent tax returns prior to that period, any conspiracy with Jennifer Rodriguez did not start until after July of 2006.

And number two, the indictment alleges that I impersonated a law clerk and obtained confidential informant, such as Social Security Numbers for individ-

uals incarcerated in the Florida Department of Corrections.

While it is true that some confidential informant was—information was obtained from the clerk's file, I do not recall ever impersonating a law clerk to obtain the public information from the court files.

More importantly, for a large number of the fraudulent tax returns submitted for tax years 2004, 2005, and 2006, the individuals' confidential information was not obtained through the courthouse records but through an electronic medium accessed by other individuals who had such access.

[17] MR. LOEBL: Your Honor, if I may.

THE COURT: You may. I'm just processing all that for a moment.

MR. LOEBL: Let me explain for a minute where we are.

THE COURT: Okay.

MR. LOEBL: Mr. Davila participated in the filing and preparation of fraudulent tax returns for the tax years at issue here, as alleged in the indictment. There's no dispute about that.

The government's manner and means alleges that he impersonated a law clerk, and that the conspiracy was confined to Jennifer Rodriguez, one other individual, for a period of time from January 1 of '05 to approximately December 31 of '07.

I believe if the Court were to receive the factual basis from Special Agent Hale today, the Court would learn that Mr. Davila did not know Ms. Rodriguez until July of '06.

And while it is true that some of the confidential information was learned in that manner as alleged in the indictment, that is, through the clerk office's files, other information, as disclosed in the government's disclosures, certain Accurint or electronic data revealing certain prisoners' Social Security Numbers, indicates that other information for other prisoners among the 134 total prisoners on whose behalf fraudulent tax returns were submitted were obtained through this electronic medium. That is not [18] specifically delineated in the indictment.

Mr. Davila is not at all discounting the fact that he is guilty of the offense of conspiracy that is with Jennifer Rodriguez from the time period, as he just explained, when he met her in mid-July of '06 through the remaining time period of their relationship. All he is doing is explaining for the benefit of the Court that the manner and means as alleged in the indictment is a little incomplete. The government did not have a complete picture of what occurred. But Mr. Davila is not at all discounting his role in the preparation and filing of those tax returns for the 134 individuals at issue in the government's relative conduct table.

Is that correct, Mr. Davila?

THE DEFENDANT: Yes, sir.

THE COURT: All right. I'm going to ask the government to present its testimony. But I just want to make sure that I understand that we've gone over the elements of conspiracy. Does he admit that his conduct would satisfy the elements of conspiracy under the statute?

MR. LOEBL: And I have been over that with him at length, your Honor. I can assure you that he understands the elements. I will ask the Court again to ask him that. But I stand here confident in the fact that we have gone over this at some length.

BY THE COURT:

[19] Q Mr. Davila, one more time. I've gone over with you the elements of conspiracy that the government has to prove in order to convict you of this crime at trial. And you acknowledged those elements, the three elements that I went over with you. And I'm not getting into the details of the exact date that the conspiracy began. I just simply want you to tell me, do you admit that your conduct would satisfy the elements of conspiracy that I described for you?

A Yes, sir.

THE COURT: All right. Now, I am going to ask the government, at this point, to provide me with a brief testimony so that I can determine if a factual basis exists to support your guilty plea and conviction. So if you would have a seat at the counsel table for a few moments, I'm going to ask Ms. Rhodes to present that testimony. Thank you.

MS. RHODES: Your Honor, we call Special Agent Jeff Hale.

GOVERNMENT'S WITNESS, JEFFREY HALE, SWORN.

THE CLERK: Please state your name and your occupation for the record.

THE WITNESS: My name is Jeffrey Hale, Special Agent with the Internal Revenue Service Criminal Investigation Division.

THE CLERK: Where are you located?

THE WITNESS: Augusta, Georgia.

[20] THE CLERK: All right. Thank you, Mr. Hale.

DIRECT EXAMINATION

BY MS. RHODES:

Q Agent Hale, would you pull that microphone over in front of—there you go. Thank you. Agent Hale, were you involved in the investigation involving Anthony Davila?

A Yes, ma'am.

Q And how did you become involved in that investigation?

A We got a referral from the Federal Bureau of Investigation from an informant that came in, and

began conducting research on bank accounts and things of that nature to lead us down the road to Mr. Davila's scheme.

From the informant, we got that Mr. Davila did conduct Internet research of the Florida Department of Corrections web site, and that he used this information to get case files, numbers, go down to the courthouse in Hillsborough County and obtain the case files on these prisoners that had lengthy sentences that were committed through Hillsborough County.

Q Pull the microphone closer, please.

A I'm sorry.

Q Thank you.

A Can you hear me now? He would conduct Internet research through the Florida Department of Corrections web [21] site, and find prisoners that were committed through Hillsborough County, where he could readily go down to the courthouse and get the information. And he would go down to the courthouse, he would obtain the case files. Within the case files would be information like, from the committals, perhaps, that had their Social Security Number, name, date of birth, things like that.

He'd use this information to file false form 1040EZ, for the most part. And he would also, again, conduct Internet research through the Florida Secretary of State web site to get employer identification numbers from some large companies and use these to create

false forms W-2 to associate with the false 1040EZ. And then he would mail these to the Internal Revenue Service.

Q And seeking refunds; is that correct?

A Yes, ma'am. Seeking refunds.

Q In an effort to sort of—I want to back up just a little bit, then, in an effort to understand the timeframe that we're talking about here. Let me ask it this way. Once you got sort of the information that began this investigation and you began to understand that false returns had been filed, did you trace where the refunds were being deposited to?

A Yes, ma'am. Yes, ma'am.

Q And where were they being deposited?

A They were being deposited to Mr. Davila's bank [22] accounts.

Q And so these were bank accounts in his name?

A Yes, ma'am.

Q And how many bank accounts did he have?

A He had approximately 14. I think there were seven banks with a savings and a checking account in each bank.

Q And during the course of your investigation, were you able to trace funds, refunds from the IRS, to all of

these bank accounts that were in the name of Mr. Davila?

A All refunds that he received were in his bank account. And attempts—we had some of the returns did not result in a refund. But there would be the automatic deposit routing numbers and checking account numbers, which were the same bank accounts that Mr. Davila controlled.

Q So in other words, the refunds were actually denied on some of these fraudulent returns that were sent into the IRS, but, for some reason, actually not paid out; is that correct?

A Yes, ma'am.

Q What were the number of fraudulent returns that you discovered or uncovered in your investigation, both—and I'm talking about the total number from the Southern District and the Middle District of Florida.

A The total that we were able to find in our investigation, 134 false claims—

[23] Q I'm sorry. Go ahead.

A That he either received refunds from or filed claims for. Some were successful, some were not.

Q In other words, of those 134, not every one of them resulted in an actual payment from the IRS?

A Correct.

Q And how many of those were mailed or had some connection to the Southern District of Georgia?

A There were 11 claim that were sent from the Southern District of Georgia.

Q The 11 returns that were mailed from the Southern District of Georgia, were you actually able to obtain those returns during the course of your investigation and—

A Yes.

Q —match them up with an individual whose name was used?

A Yes, ma'am.

Q Okay. What—I want you to tell the Court, if you will, about obtaining the physical returns and what evidence you actually recovered or discovered when you received those physical returns from the Atlanta Office of the IRS.

A We received the 11 original returns, and on those returns were the prisoners' names that—in which the return was filed and also the bank account routing number for Mr. Davila on each one of those returns. And we were able to [24] confirm through the Florida Department of Corrections that each one of these 11 prisoners were in the custody of Florida Department of Corrections during that time. During the 2006 tax year, that they were in custody. And we verified the form W-2 employers that were associated with these returns

that these individuals did not withdraw wages or have federal withholdings in the 2006 tax year.

Q Did you actually receive the envelope on at least one of those 11 returns?

A Yes, ma'am. That was not a Southern District envelope, but there was one that was filed.

Q From the District of South Carolina?

A From Florida.

Q Okay. I'm sorry.

A And I believe the name was Jerome Santos. I'm going off of memory. But we did find Mr. Davila's fingerprint on the envelope. So we do get the envelopes associated with the tax return that was mailed.

Q What was the total amount of loss? That is, what is the total amount paid out by the IRS on the—of the returns that were paid—of all of the fraudulent ones that you have accounted for in the 134?

A They were 87 refunds deposited into Mr. Davila's bank accounts that totaled $423,530.63.

Q And those returns were paid out for the tax years of [25] 2004, 2005, and 2006; is that correct?

A Yes, ma'am.

Q And although the conspiracy in the indictment alleges that the dates between which those things

occurred as January 1st of 2004 up through December 31st of 2006, that is because the tax year covers those dates; is that correct?

A Yes, ma'am.

Q Okay. When Mr. Davila was arrested on these charges, did you have an opportunity to speak with him?

A Yes, ma'am.

Q And did you ask him about the charges and his participation in them?

A Yes, ma'am.

Q And, generally, what did he tell you?

A He stated that he was aware that these refunds being deposited into his bank accounts were a result of false claims. And he stated that his participation was limited to the mailing of the returns at the direction of his ex-wife.

Q And she is down in Florida; is that correct?

A Yes, ma'am.

Q And are you aware of whether or not there's actually an investigation ongoing against his ex-wife in Florida?

A Yes, ma'am.

Q There is an investigation?

A Yes, ma'am.

[26] Q Do you know whether or not she's yet been indicted?

A I do not.

MS. RHODES: Your Honor, I don't think I have any other questions at this time.

THE COURT: Thank you.

Mr. Loebl, do you have any questions for Special Agent Hale?

MR. LOEBL: I want to clarify—

THE COURT: Certainly.

MR. LOEBL:—just a couple points.

THE COURT: Go right ahead.

CROSS-EXAMINATION

BY MR. LOEBL:

Q Special Agent Hale, it's good to see you again. I will be much more brief than I was at the detention hearing. At that hearing, you'll recall I asked you some questions about when—during the timeframe of Mr. Davila's incarceration. Do you recall that?

A Yes, I do.

Q And do you recall, as you sit here today, whether Mr. Davila was in prison from February of '03 through mid '05?

A I don't know the dates of his incarceration.

Q Okay. In any event, are you aware of any evidence that Mr. Davila knew the informant, Jennifer Rodriguez, prior to July of 2006?

[27] A No, I'm not aware of any evidence prior to 2006.

Q And you recall I asked you about that at the detention hearing as well?

A Yes.

Q And that was your response then?

A Yes, sir.

Q Okay. And Patricia Rhodes, on Direct a moment ago, indicated that the indictment alleged the timeframe of January 1 of '04 through December 31 of '06, I believe. But in any event, the indictment actually alleges January 1 of '05 through December 31 of '07.

For the Court's benefit, the government came to that timeframe based on the tax years for which the returns are submitted. That is, the 2004 returns corresponded to the timeframe of January 1 of '05 through the end of that year, December 31 of '05, basically; is that correct?

A Yes, sir.

Q So you have an '04, an '05, an '06 fraudulent tax returns that correspond respectively to '05, '06, and '07, years in which they were filed?

A Correct.

Q Fair enough. I believe, if I didn't mishear you, and I may have, but I believe you said that the false and fraudulent tax returns were submitted in Mr. Davila's name, and maybe that was a slip of the tongue. But as I understand, the [28] conspiracy and the relevant conduct, the returns were prepared and filed in the names of other prisoners; is that correct?

A That's correct.

Q And they were—basically, the key evidence that the government has is that the monies which the government was able to track, after talking to the informant, were deposited into accounts owned by Mr. Davila; is that correct?

A Correct.

Q Just briefly, Special Agent Hale, you and I have discussed a little bit about the manner and means, that is, how the government came to the belief that the conspiracy was carried out by going to the clerk's office. That information came from the informant, one Jennifer Rodriguez; is that correct?

A That's correct.

Q And, again, that's the same individual that, as far as the government knows, Mr. Davila didn't know until July of '06?

A Correct.

Q So what happened prior to that timeframe? Let me ask you this: Has the government spoken to anyone directly who has information concerning a filing of fraudulent tax returns prior to July of '06?

A No, sir.

Q Other than Mr. Davila himself?

[29] A Correct.

Q And when the government spoke to him, he acknowledged, first of all, that he was aware that the monies were obtained through the filing of fraudulent tax returns?

A Correct.

Q And he also acknowledged that the money was deposited into the accounts that he owned?

A Correct.

Q Just for the sake of completeness, Special Agent Hale—

MR. LOEBL: May I approach, your Honor?

THE COURT: You may.

BY MR. LOEBL:

Q I'm going to show you a couple of different items. First of all, government disclosures, starting at USAA 0351 and then that goes through 367. Then starting with 368 for approximately three pages. That's 368 through 371. And I'm sorry, I skipped over the ones in the middle, which is USAA 364 to 367. Basically, if you would just take a moment to flip through. I know that you are aware of those documents.

A Yes.

Q Do they look familiar to you?

A Yes, sir.

Q And in the first packet I gave you, are those the government's disclosures showing certain information on some of [30] the prisoners that appears to be printed off an Accurint program?

A Correct.

Q And for the Court's benefit, what is Accurint?

A It's a database, and I don't have full understanding of how it works, but you can enter someone's identifying information and get other identifying information, more specific.

Q Such as you enter a last name, it spits out the Social Security and last known address, something like that?

A It can be used for that, yes.

Q And as far as the government is aware, Mr. Davila was obviously a felon at the time of the events at issue in this case; is that correct?

A I'm sorry?

Q Mr. Davila had a criminal history and was a felon at the time of the events at issue in this case; is that correct?

A He was a felon.

Q At the time of this events that occurred in the case? You're aware of that?

A Yes.

Q And to your knowledge, did Mr. Davila have access to Accurint information?

A I don't know if he had access to Accurint.

Q In any event, the government served subpoenas [31] following up on the Accurint information and who specifically accessed those prisoner's personal identifying information; is that correct?

A Yes.

Q And the government obtained a response to that subpoena; is that correct?

A Yes.

Q And the response indicated that an individual with Superior Asset Management had access to the personal identifying information for those prisoners listed?

A Correct.

Q And, specifically, the individual was—is it Isabella Calabro? Does that sound correct?

A Yes.

Q Okay. And as far as—did the government ever determine who that was?

A No, we did not.

Q Go ahead. Did the government ever determine whether Iris Davila, Mr. Davila's ex-wife, had ever worked with Superior Asset Management?

A I'm not sure if she did. There was something about the movement of the company. But I'll be honest, I don't recall right off the bat where the company had relocated.

Q Okay. In any event, the manner and means of the conspiracy alleged in the indictment doesn't at all reflect [32] anyone's use of Accurint information or other electronic databases to obtain prisoner's personal identifying information; is that correct?

A Yes, sir.

MR. LOEBL: One moment, your Honor.

THE COURT: Sure.

MR. LOEBL: Thank you, your Honor.

Thank you, Special Agent Hale.

THE COURT: Any followup, Ms. Rhodes?

MS. RHODES: No, your Honor.

THE COURT: You are excused. Thank you, Special Agent Hale.

All right. Mr. Loebl and Mr. Davila, you can return to the lectern, and we will complete the hearing.

Mr. Davila, I've just heard the testimony of Special Agent Hale. You also made a statement prior to that testimony. Other than the issues about when you met Ms.—the unindicted codefendant, J.R., do you agree in general with what he has just told me in his testimony?

MR. LOEBL: You can answer and explain.

THE DEFENDANT: I admit to what Special Agent Hale just said except for the clarification that I want noted that there were some inaccuracies in the indictment that are relevant to my conduct when I'm going to be sentenced.

THE COURT: Okay. But, otherwise, you agree and [33] admit to what he told me.

THE DEFENDANT: Yes, sir.

THE COURT: Let's move on to the plea agreement now. I have in front of me a plea agreement that appears to have been signed, Mr. Davila, by you in the presence of your attorney on May 11, 2010. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read this agreement before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you go over this agreement with your attorney before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by initialing and signing this plea agreement, that you are agreeing to be bound by all of its terms and, furthermore, you are agreeing that all of the facts, particularly the factual statements set forth in the plea agreement, are true and accurate? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, as I have reviewed your plea agreement, it provides in summary that you are entering a plea of guilty as to Count One, which is the conspiracy count;

That you will pay restitution to the United States Department of Treasury;

[34] That if the government allows you to cooperate and it determines, in its sole discretion, that you have rendered cooperation that rises to the level of substantial assistance, that you will agree to do so fully and to testify truthfully at all times.

And I also note that you have voluntarily and expressly waived your right to appeal the conviction and sentence and the right to collaterally attack the sentence in a post conviction proceeding on any ground, except that if your sentence exceeds what the law allows or if it exceeds the high end of the sentencing guideline range, then you would have a right to appeal, directly appeal, the sentence in that event.

Do you understand that you are giving up or waiving your rights, subject to these conditions, to have an appeals court review your conviction and sentence? Do you clearly understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I have noted that the government has agreed that, in consideration of the agreements that you've made that I've just described, that they will dismiss Counts 2 through 34 of this indictment;

That they will not object to you receiving a full three-point reduction in your offense level for acceptance of responsibility, assuming that you do so;

And, finally, the government has agreed that it will [35] file a motion for a downward departure in your

sentence or for a reduction of your sentence, if it has already been imposed, in the event that you render substantial assistance in terms of cooperation in the investigation and prosecution of others.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, Ms. Rhodes, have I accurately summarized the highlights, if you will, or the major points of this plea agreement?

MS. RHODES: Yes, your Honor.

THE COURT: Thank you.

Mr. Loebl, from your standpoint, is that a fair summary?

MR. LOEBL: Yes, your Honor.

THE COURT: Is this what you've agreed to?

THE DEFENDANT: Yes, sir.

THE COURT: Other than the promises made in this plea agreement by the government, has anyone else promised you anything in order to get you to plead guilty today, Mr. Davila?

MR. LOEBL: One moment, your Honor.

THE DEFENDANT: Okay, your Honor. I agree.

THE COURT: Your answer is yes to that question?

THE DEFENDANT: Yes, sir. Yes, sir.

THE COURT: I now want to inform you of the statutory penalties that apply to Count One, the conspiracy charge, in [36] violation of 18 United States Code Section 286.

On this Count One, you can be sent to prison for not more than ten years. You can be fined not more than $250,000. You can be placed on supervised release, following a period of incarceration, for not more than three years. And there will be a $100 special assessment that will be paid to the government at the time of your sentencing.

Do you understand these statutory penalties, the maximum, that can be imposed in this particular case?

THE DEFENDANT: Yes, sir.

THE COURT: I also have the power to order restitution in the full amount of restitution required in this case.

Now, Mr. Davila, in the federal system, parole has been abolished, so any sentence that this Court imposes upon you will have to be served in full, subject to any reductions for good time credits that the Bureau of Prisons may determine that you are entitled to. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, after you have served a prison sentence, if any, you will be placed on supervised re-

lease for a period of time, in this case, not more than three years.

During the period of supervised release, your conduct will be monitored very closely by a probation officer. There will be a number of conditions, both standard and special, that [37] will be imposed upon you for your period of supervised release.

If you violate any of the conditions or rules of your release, I have the ability to revoke your release and require you to serve in prison all or part of the time that you would have remaining on your period of supervised release. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Furthermore, as a result of this conviction—this is a felony—you will be deprived of a number of civil rights, including the right to vote, the right to serve on a jury, the right to hold public office, the right to own or possess a firearm. And in many cases you can encounter difficulty finding employment. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you plead guilty here today, and if I accept your guilty plea, I will order a Presentence Investigation Report which will be prepared by the probation officer. The officer will conduct a very thorough investigation of your case and will ask you a number of questions. Your attorney may be present for

those questions, if you wish. You simply need to let them know.

Now, once the investigation has been completed, a draft report will be prepared. A copy of the draft report will be sent to the government. A copy will be sent to you and your [38] attorney. You should read that report very carefully because if there are any errors in the report or if you have any objections about anything in the report then you are required to let the probation officer know. And there are deadlines for doing that.

Once the probation officer has considered any corrections or objections filed by either you or the government then he or she will prepare a final report. That report will be distributed, again, to the government and to you and your attorney. A third report will be provided to me. I will use that final report in determining the final sentence in your case. It is at that time that we will actually schedule your sentencing hearing.

Now, at that hearing, you will be allowed to present any evidence or other information that you wish in mitigation of your sentence. In addition, if you wish to make a statement personally to me at that time, then I will allow that to happen.

Now, during the hearing, you will hear me refer to a calculation under the Federal Sentencing Guidelines. These are guidelines issued by the United States Sentencing Commission. They are not mandatory on the Court. Rather, they are advisory.

What will happen is, based upon the investigation that the probation office will conduct, they will calculate an [39] advisory guideline range, which is a range of months that you can be sentenced to.

Now, remember, I told you that the guidelines were advisory and not mandatory. Now, typically, I sentence within the range. That's just my practice. However, I have the ability, due to the circumstances of each case, to sentence outside the range, which means I do have the ability to go higher than the range or lower than the range, if I see fit.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that any estimate of potential range that you may have heard or discussed is at this point only an estimate because not until the probation office conducts its full investigation will we be able to know the final range. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone predicted or made a prophesy that you would receive a specific sentence in this case?

THE DEFENDANT: No, sir.

THE COURT: Have you previously discussed the sentencing guidelines with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Davila, has anyone forced or pressured you to plead guilty today?

THE DEFENDANT: No, sir.

[40] THE COURT: Has anyone made a promise to you to get you to plead guilty, again, other than the promises that the government provided in the plea agreement?

THE DEFENDANT: No, sir.

THE COURT: Do you have any questions about any other matters that I have discussed with you here today?

THE DEFENDANT: No, sir.

THE COURT: Do you still want to plead guilty to Count One of this indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty to Count One because you are, in fact, guilty of Count One?

THE DEFENDANT: Yes, sir.

THE COURT: Then the record should reflect that the defendant has pled guilty to Count One of the indictment. Let the plea now be signed and entered.

THE CLERK: The plea of guilty to Count One of the indictment has been entered, your Honor.

THE COURT: Thank you.

Based upon the signing and entry of the guilty plea for Count One of the indictment, the Court will now enter the following findings:

The defendant is competent, and he fully understands the charged against him. There is a factual basis for his plea of guilty on Count One. He knows the maximum punishment that [41] could be imposed on this charge. And he knows his jury rights and has voluntarily waived those rights.

I further find that the defendant's decision to plead guilty this afternoon was voluntary, knowing, and not the result of any force, pressure, threats, or promises, other than the promises made by the government in the plea agreement.

Therefore, this defendant is adjudged guilty of Count One of the indictment based upon his plea of guilty.

At this time I will order the preparation of a Presentence Investigation Report. The parties are cautioned to pay careful attention to all the deadlines relating to the preparation of the report and the filing of any objections thereto. Upon completion of the final report, the Court will schedule a sentencing hearing for a later date.

If there is nothing further in this matter, then, I will remand you to the custody of the United States Marshal pending the completion of the presentence inves-

tigation, preparation of the report and your final sentence.

MR. LOEBL: Your Honor, one issue that Mr. Davila had asked me to bring to the Court's attention. I haven't look at this in almost two years, but at one time, given the substantial assistance provision or cooperation provision in the plea agreement, some Courts have made those plea agreements unavailable to the public on PACER. I didn't know if the Court had a protocol for that or not.

[42] Mr. Davila has spent time in prison, and he is concerned that the plea agreements are distributed or become knowledge of other persons in jail. While he understands that we can only make a request, I did want to make that request known to the Court.

THE COURT: Mr. White, do you have any knowledge of that? It's the first I've heard of that.

MR. WHITE: I know defendants in the past have requested that they be placed under seal should they have any concerns over the cooperation agreement being included.

THE COURT: Do you have any response, Ms. Rhodes?

MS. RHODES: Your Honor, I have, in the past when a defendant has cooperated, filed the actual 5K or Rule 35 motions as restricted documents, that is, with only limited access to the lawyers in the party or in the case.

But I have not filed plea agreements as restricted documents because 99.9 percent of our plea agreements all contain a cooperation provision whether—because the provision simply allows for the cooperation. It doesn't demand it.

MR. LOEBL: That sounds reasonable, your Honor.

THE COURT: It doesn't address the details of any cooperation. That's in the motion.

MS. RHODES: That's right.

MR. LOEBL: Mr. Davila has indicated that it's okay [43] with him.

THE COURT: Quite frankly, I can't remember a plea agreement in the last two years that didn't have a cooperation provision. So it's pretty standard.

MR. LOEBL: I think the government's proposal sounds reasonable.

THE COURT: Okay. That'll be fine.

If there's nothing further then, we are concluded.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Indictment No. CR 109-60

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

[Filed: May 17, 2010)

PLEA AGREEMENT

Patricia Green Rhodes, Assistant United States Attorney, and, Mike Loebl, attorney for the defendant, pursuant to the provisions of Rule 11, Federal Rules of Criminal Procedure, as amended, have, with the authorization of the undersigned defendant, heretofore entered into discussions with a view towards reaching a pretrial conclusion of the charges pending in the Indictment styled above, and a Plea Agreement has been reached by said parties in the following respects:

GOVERNMENT'S OBLIGATIONS UNDER THIS AGREEMENT

1. Upon the defendant's entry of a plea of guilty to the offense charged in Count 1 of the Indictment, the defendant's full compliance with all promises made hereinafter as a part of this agreement, and the defendant's adherence to all representations and understandings recited hereinafter, the attorney for the government will do the following:

a. Dismiss Counts 2-34; however the defendant understands and agrees that the Court may consider conduct in said counts as relevant conduct for purposes of determining the defendant's sentencing range pursuant to Section 1B1.3 of the Sentencing Guidelines.

b. The government will not object to a recommendation from the probation office that the defendant receive a 2 level reduction for acceptance of responsibility under the provisions of Chapter Three Part E Acceptance of Responsibility of the sentencing guidelines, based upon the defendant clearly demonstrating acceptance of his responsibility for his offense in accordance with Section 3E1.1(a) of the Sentencing Guidelines.

If the defendant qualifies for a decrease under subsection (a), the government will make a motion for an additional 1-point reduction for acceptance of responsibility, provided the defendant truthfully admits the conduct comprising the offense of conviction, has fully complied with the terms of pretrial release, if applicable, has not engaged in criminal conduct sub-

sequent to arrest or initial appearance in this matter, and truthfully admits or does not falsely deny any additional relevant conduct for which the defendant is accountable under the United States Sentencing Guidelines.

c. COOPERATION PROVISION

The government shall advise the Court of the extent and value of any information, cooperation, or assistance in the investigation and prosecution of others provided by the defendant.

If the defendant's cooperation is completed prior to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" pursuant to 18 U.S.C. §3553(e) and U.S.S.G. §5K1.1 and under the policies of the United States Attorneys Office for the Southern District of Georgia warrants the filing of a motion for downward departure from the applicable sentencing guideline range and departure below any applicable statutory mandatory minimum sentence. If the defendant's cooperation is completed or likely to be completed subsequent to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" pursuant to 18 U.S.C. §3553(e) and Rule 35, Fed. R. Crim. P. and under the policies of the United States Attorneys Office for the Southern District of Georgia warrants the filing of a motion for downward departure from the applicable sentencing guideline range and departure below any applicable statutory mandatory minimum sentence, within one year of the imposition of sentence.

The defendant fully understands that whether or not the sentencing court decides to depart downward below a guideline range or statutory minimum sentence, or reduce the defendant's sentence, as well as the extent of any such downward departure or reduction, is completely within the sentencing court's discretion, and that the Court is not bound to accept any recommendation by the government.

If the defendant should be called as a witness in a case in which he has provided information, the defendant understands and agrees to the following:

i. That he shall testify truthfully and completely before any grand jury, trial jury, or in any proceeding preliminary or ancillary thereto, to which the information provided under this agreement may pertain, and to waive any privileges which the defendant may have with regard to such testimony.

ii. That he shall meet with law enforcement agents and/or counsel for the government at times and places of their choosing, as may be necessary to discharge the defendant's obligations under this agreement, and in connection therewith the defendant waives any right to the presence of his counsel during such meetings.

iii. That the defendant is required at all times to give complete, truthful, and accurate evidence and testimony when call upon to do so by the government or another defendant; That the defendant is not called upon by this agreement nor any other to implicate any particular individual as to any particular illegal activity,

nor to "make a case" against anyone; That the defendant's benefits under this agreement are conditioned solely upon his cooperation and truthfulness, and are IN NO WAY conditioned upon the outcome of any trial, grand jury, or other proceeding;

iv. The defendant agrees to waive all rights under the Speedy Trial Act, if necessary, to delay sentencing until the completion of substantial portions of the defendant's cooperation, so as to provide the sentencing court with all relevant information.

v. If the defendant should fail in any way to fulfill completely his obligations under this agreement then the government will be released from its commitment to honor all of its obligations to him. Thus, if at any time he should knowingly withhold evidence from government investigators prior to or in his testimony before grand juries or trials, then the government will be free (1) to prosecute him for perjury, false declaration, false statement, and/or obstruction of justice [18 U.S.C. §§ 1621, 1623, 1001, 1503]; (2) to prosecute him for all violations of federal criminal law which he has committed; (3) to use against him in all of those prosecutions and sentencings the information and documents he disclosed or furnished to the government during the course of his cooperation; (4) to recommend a maximum sentence; and (5) to seek forfeiture of any and all forfeitable properties of the defendant. The parties agree to submit to the court, to be decided by a preponderance of the evidence standard, the question of whether defendant has breached this agreement.

DEFENDANT'S OBLIGATIONS UNDER THIS AGREEMENT

2. The Defendant agrees:

a. to plead guilty to Count I of the Indictment

b. to a limited waiver of appeals: To the maximum extent permitted by federal law, the defendant voluntarily and expressly waives the right to appeal the conviction and sentence and the right to collaterally attack the conviction and sentence in any post-conviction proceeding, including a § 2255 proceeding, on any ground, except that: the defendant may file a direct appeal of his sentence if it exceeds the statutory maximum; and the defendant may file a direct appeal of his sentence if, by variance or upward departure, the sentence is higher than the advisory sentencing guideline: range as found by the sentencing court. The defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government appeals the sentence imposed, the defendant may also file a direct appeal of the sentence.

The defendant also understands that in accordance with United States v. Booker, the district court, while not bound to apply the federal sentencing guidelines, must consult those guidelines and take them into account to formulate a reasonable sentence.

c. to pay restitution to the United States for fraudulently filed returns which were paid during the course of the conspiracy count, plus and fines and interest, as calculated by the IRS.

3. DEFENDANT'S REPRESENTATIONS TO THE COURT AND FURTHER OBLIGATIONS UNDER THIS AGREEMENT:

a. FACTUAL BASIS:

The defendant understands that Count One of the Indictment charges him with Conspiracy against the United States as follows:

INTRODUCTION

At all times relevant to the Indictment:

1. In the Southern District of Georgia and the Middle District of Florida, between January 1, 2005 and December 31, 2007, the Defendant, **ANTHONY DAVILA**, caused to be filed with the Internal Revenue Service more than 120 false income tax returns in other individuals' names that together claimed over $630,000 in false, fictitious, or fraudulent refunds.

2. The Defendant received from the United States Department of Treasury more than more than $423,000 as a result of these false returns.

3. The Internal Revenue Service (IRS) was and is an agency of the United States Department of Treasury responsible for administering and enforcing the tax laws of the United States.

4. For tax years 2004, 2005, and 2006, the Defendant prepared and caused to be filed with the IRS false individual tax returns that contained one or more false statements.

COUNT ONE
Conspiracy

5. The allegations of paragraphs 1 through 4 are re-alleged and incorporated by reference as if set forth fully herein.

6. Beginning on or about January 1, 2005 through December 31, 2007 in the Southern District of Georgia, the Middle District of Florida, and elsewhere, the defendant herein,

ANTHONY DAVILA

did combine, conspire, confederate, and agreed together with unindicted co-conspirator J.R., to knowingly and willfully defraud the United State Department of Treasury by obtaining and attempting to obtain payment of false claims using the following:

Manner, Means and Overt Acts

7. It was part of the conspiracy that the defendant did use the internet to search the Florida Department of Corrections (FDOC) website and the websites of other state prisons to identify inmates who were serving sentences which generally exceeded 15 years;

8. It was further part of the conspiracy that the defendant did record the names and case numbers of the inmates which he identified;

9. It was further part of the conspiracy that the defendant did contact the county clerk's office which maintained the case files of the inmates defendant had

selected, and the defendant did impersonate a law clerk in order to obtain access to these files;

10. It was further part of the conspiracy that, using the clerk's offices files, the defendant did obtain the full names, birth dates, address, and social security numbers of the inmates he had selected;

11. It was further part of the conspiracy that the defendant did search the Florida Corporation website for Employer Identification Numbers (EIN) of large corporations, which he then used to create fictitious W-2 forms in the names of the inmates that the defendant selected;

12. It was further part of the conspiracy that the defendant did then use the fictitious W-2 forms and the fraudulently obtained data on the inmates to create fictitious 1040EZ tax forms.

13. It was further part of the conspiracy that the defendant did forge the signatures of the inmates on the 1040EZ forms and mail said forms to the IRS;

14. It was further part of the scheme that J.R. deposited certain of the false and fictitious returns in the mails.

15. It was further part of the conspiracy that the defendant set up multiple bank accounts in his own name, into which more than $423,000.00 in fraudulently obtained IRS tax refunds were deposited.

All done in violation of Title 18 Unites State Code Sections 286 and 2. The defendant's guilty plea constitutes proof as to that Count One, Conspiracy.

The defendant understands and agrees that nothing in this agreement shall abrogate the duty and right of the government to bring all sentencing facts to the attention of the sentencing court, and the defendant further agrees that the government shall not be bound to make any recommendation under this agreement if to do so would directly contradict facts relevant to the offense conduct or the defendant's prior conduct or criminal history, which first come to the attention of the government, or are confirmed as true, only after the signing of this agreement.

The defendant understands that the Court is not a party to this agreement, that the government can only make recommendations which are not binding on the Court, and that after the entry of the defendant's guilty plea, the defendant has no absolute right to withdraw the plea. Thus, the Court is free to impose any sentence authorized by law up to the statutory maximum sentence.

The defendant further advises the Court that the defendant understands that the U.S. Probation Office will prepare a presentence investigation report for the Court, and that the U.S. Probation Office will consider all of defendant's conduct related to the offense to which he is pleading, which may include conduct related to Counts of the Indictment which were or are to be dismissed or for which the defendant was acquitted, as

well as the defendant's criminal history, and that these facts may be considered by the Court in determining the defendant's sentence. The defendant understands that the offense level and criminal history category determined by the United States Probation Office and the Court may differ from that estimated or projected by defendant's counsel or the United States Attorney.

The defendant advises the Court that the defendant understands that if the relevant conduct, guideline sentencing range, or sentence imposed by the Court is more or greater than the defendant expected or, in the case of relevant conduct, is found to be more extensive than the defendant has admitted to, the defendant will still have no absolute right to withdraw the guilty plea.

b. FINES, ASSESSMENTS, AND FORFEITURES:

The defendant understands that any assessments imposed pursuant to 18 U.S.C § 3013 ($100) by the Court at sentencing must be paid on the date of sentencing.

The defendant understands that if a fine or restitution is imposed by the Court at sentencing, or if the United States is pursuing the forfeiture of any property in which the defendant has an interest, whether by administrative, civil, or judicial proceeding, the defendant shall meet with a member of the Debt Collection Unit of the United States Attorney's Office on the day of sentencing and complete a written personal financial statement setting forth the defendant's assets and liabilities as of the date of the offense. The de-

fendant further understands that by completing the financial statement, the defendant is representing that it is true and accurate to the best of the defendant's information, knowledge, and belief and agrees to make an honest, good faith effort to pay said fine as directed by the financial litigation section of the United States Attorney's Office.

The defendant agrees to fully assist the government in the recovery and return to the United States of such assets or portions thereof as described above. The defendant further agrees to make a full and complete disclosure of all assets over which defendant exercises control and those which are held or controlled by any nominee. The defendant further agrees to take whatever steps and actions are necessary to pass clear title to the United States as to the property described above or any other forfeitable property, including, but not limited to, surrender of title, the signing of consent decrees of forfeiture, and the signing of any other documents necessary to effectuate such transfers. The defendant agrees to consent to any civil or administrative forfeiture and to take any steps necessary to locate property and to pass marketable title to the United States before the defendant's sentencing.

c. FOIA AND PRIVACY ACT WAIVER

The defendant retains all discovery rights to documents pertaining to the investigation and prosecution of this case as may by law apply to any post-conviction litigation as to which the right to proceed has not otherwise been waived or relinquished by the defendant in

this agreement or otherwise; HOWEVER, notwithstanding any right on the part of the defendant to post-conviction litigation, the defendant, as a part of this agreement and in consideration of the promises by made the government hereunder, waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any record pertaining to the investigation or prosecution of this case under the authority of the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a, and all subsequent amendments thereto.

4. DEFENDANT'S FURTHER REPRESENTATIONS TO THE COURT:

a. The defendant represents to the Court that the defendant has had the services of an attorney the defendant believes to be competent; that the defendant has met with said attorney on a sufficient number of occasions and for a sufficient period of time to discuss the defendant's case and receive advice; that the defendant has been truthful with his attorney and related all information of which the defendant is aware pertaining to the case; that the defendant and defendant's attorney have discussed possible defenses, if any, to the charges in the indictment, including the existence of any exculpatory or favorable evidence or witnesses, discussed the defendant's right to plead not guilty and compel a public trial by jury or by the Court, the right to the assistance of counsel throughout the proceedings, the right to call witnesses in the defendant's behalf and compel their attendance at trial by subpoe-

na, the right to confront and cross-examine the government's witnesses, the defendant's right to testify in the defendant's own behalf, or to remain silent and have no adverse inferences drawn from the defendant's silence; and that the defendant, with the advice of counsel, has weighed the relative benefits of a trial by jury or by the Court versus a plea of guilty pursuant to this Agreement, and has entered this Agreement as a matter of the defendant's free and voluntary choice, and not as a result of pressure or intimidation by any person.

b. The defendant further represents to the Court that the plea agreement as set forth herein and the plea to be entered by the defendant is the result of prior discussions between the attorney for the government and the attorney for the defendant, conducted with the defendant's authorization, knowledge and consent; that this plea agreement contains the entire agreement and understanding between the government and the defendant; and that the defendant has no other agreements, understandings, or deals with any person other than those set out in this plea agreement, that is, the defendant advises the Court that the defendant's entire understanding of this Plea Agreement is completely set forth in writing in this document.

c. The defendant represents to the Court that the defendant has been advised of the nature of the charge to which the plea of guilty is to be offered, of the maximum possible penalty provided by law, as set forth above, and that by entering a plea of guilty the defendant gives up all of the rights set out in paragraph

"a" above, gives up any defenses to the charges, and understands that there will not be a further trial of any kind. The defendant further understands that in entering a plea of guilty, the Court will ask questions about the offense to which the plea is entered.

The defendant understands that the defendant will be under oath and on the record in answering those questions, and that the defendant's answers may later be used against the defendant in a criminal prosecution for perjury or false statement if those answers are not truthful

5. FAILURE TO COMPLY WITH TERMS OF AGREEMENT

If the defendant at any time fails to comply with any of the terms of this agreement in any way, the government shall be released from its promises herein. This includes, but is not limited to, any attempt by the defendant to obstruct justice, for example, by influencing a witness's testimony or committing new crimes prior to the acceptance of the plea by the court.

This 13 day of May, 2010

EDWARD J. TARVER
UNITED STATES ATTORNEY

/s/ PATRICIA G. RHODES
PATRICIA G. RHODES
Assistant United States Attorney
Georgia Bar No. 307288
Lead Counsel

/s/ NANCY C. GREENWOOD
NANCY C. GREENWOOD
Deputy Criminal Chief
Augusta Branch Office

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

INDICTMENT NO. CR 109-60

UNITED STATES OF AMERICA

v.

ANTHONY DAVILA

I have read the foregoing Plea Agreement, consisting of thirteen (13) pages, and I understand what it says and means, and by my signature hereunder I swear or affirm under penalty of perjury that the matters and facts set forth therein are true, and accurately and correctly state the representations that have been made to me by my attorney and government agents and/or prosecutors, and accurately set forth the terms and conditions of the plea agreement that has been reached by my attorney on my behalf with my permission.

[5-11-10]
Date

/s/ ANTHONY DAVILA
ANTHONY DAVILA
Defendant

/s/ MICHAEL LOEBL
MIKE LOEBL
Attorney for the Defendant

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

INDICTMENT NO. CR 109-60

UNITED STATES OF AMERICA

v.

ANTHONY DAVILA

May 17, 2010

ORDER

The aforesaid Plea Agreement, having been considered by the Court in conjunction with the interrogation by the Court of the defendant and the defendant's attorney at a hearing on the defendant's motion to change the defendant's plea and the Court finding that the plea of guilty is made freely, voluntarily and knowingly, it is thereupon,

ORDERED that the plea of guilty by defendant be and it is hereby accepted and the foregoing Plea Agreement be and it is hereby ratified and confirmed.

This 17th day of May 2010.

/s/ J. RANDAL HALL
J. RANDAL HALL
JUDGE,
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
(AUGUSTA DIVISION)

Criminal Docket Number: 1:09-CR-00060

UNITED STATES OF AMERICA

v.

ANTHONY DAVILA, DEFENDANT

Feb. 8, 2010
3:50 p.m.

IN CAMERA HEARING

BEFORE THE HONORABLE
W. LEON BARFIELD
United States Magistrate Judge

Appearances:

FOR THE USA: (excused)

FOR THE DEFENDANT:

MICHAEL N. LOEBL
Fulcher Hagler, LLP
P.O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

TRANSCRIBED BY:

C. Joan Mobley
Official Court Reporter, CCR-B1678, CVR
P.O. Box 1316
Brunswick, Georgia 31521
(912) 280-1348

[2]

(P R O C E E D I N G S)
(Call to Order)

THE COURT: Where are you incarcerated?

THE DEFENDANT: In McDuffie County Jail, sir.

THE COURT: So you are not incarcerated with the guy who has just left this courtroom?

THE DEFENDANT: No, sir.

THE COURT: Come up the lectern, Mr. Davila.

Mr. Davila, we have in this district, the Southern District of Georgia, a system that has been devised and followed for many years designed to provide adequate representation to the accused in criminal cases. Now if I say anything to you that you do not understand, just raise your hand or whatever, bring it to my attention, and I will try to go over it with you until you do understand.

This system of court appointed attorney using what is a variation of a panel attorney program, the only distinction being that if you are licensed and sworn in as a member of the bar of the United States District

Court for the Southern District of Georgia, you have to certify that you have read our local rules, that you understand those rules, and that you will adhere to those rules in the performance of your duties. One of those rules requires that you be competent to handle any matter he might be appointed by the Court to represent you on. Sadly, the Court has had to explain this process to many attorneys in [3] the past where they have said, Judge, I really don't want to represent the accused in criminal cases. I don't do that kind of work because I don't like associating with that kind of person. Besides that, I am a civil practitioner and I don't know anything about criminal law, and we have heard those stories 30 years now. The fact of the matter is, if you are competent to handle the civil case, you are competent to handle a criminal case. There is no extreme variation in the procedures that are followed. You still follow the same rules of evidence, the trial rules are the same. The only difference is you have a criminal code that has the elements of the offenses in them so you have to know what the elements of the offenses are. You have to know a little bit about evidence law, which is not asking too much of the lawyers. It sometimes occurs that I will be in the courtroom with a Defendant who doesn't like his lawyer because he claims his lawyer is a civil practitioner and he doesn't know anything about criminal law and he has done this and he's done that and he's done the other when I have personal knowledge of the lawyer involved and I know what the lawyer's work ethic is and I know what his commitment to the law is. And sometimes when I pick up these letters that I get from these Defendants in these criminal cases and I read about these lawyers I

say, wait a minute. That can't be the same person that I know because I know better. Like Mr. Loebl there, he was my law clerk for a year, and he was one of the finest law [4] clerks I ever had and the hardest working law clerk I ever had. And to be frank, I never gave him anything that he couldn't handle, and I threw everything imaginable at him.

So I am going to take this letter that you wrote and we are going to go through this letter. I am going to give Mr. Loebl the opportunity to respond because I think he should be allowed to respond to protect his reputation before the Court. But I want to make something perfectly clear to you, Mr. Davila, you have a right to be represented by a lawyer in this case and the Court has appointed Mr. Loebl to represent you from a pool of attorneys that suggest to me that you were lucky in the draw. You got Mr. Loebl where you could have gotten some other attorneys that I am familiar with, and he is the only court appointed attorney you are going to get. Make sure you understand that.

Now if you want to, I will allow you to represent yourself in this case. You can be just like that guy that left the courtroom before you came in here. I was in the same situation with him several months ago and I begged him not to do what he did, which was represent himself at trial, but he did what he wanted to do. He just marched right on into court and it took the jury less than 30 minutes to convict him of armed bank robbery or bank robbery, whatever it was. And now he is facing a life sentence without parole. And you know what, he just had me to fire the lawyer that I appointed

to represent him [5] on appeal. He is not good at taking orders from people and having people tell him what is right and what is wrong. He makes all those decisions on his own.

THE DEFENDANT: Your Honor, could I address the Court a minute?

THE COURT: Sure.

THE DEFENDANT: I just received this notice of hearing on Friday and it says here that if I needed a request for a continuance or rescheduling to do it in a motion but Saturday and Sunday there is no mail going out from the jail, I have no communication on the telephone with my lawyer, and all I could do was put together in a motion caption my objections to having this hearing continued, and I wanted to see if it's possible that you can acknowledge it.

THE COURT: I will be glad to see it.

THE DEFENDANT: Thank you, sir.

(BRIEF PAUSE)

THE COURT: This motion to recuse Magistrate Judge Barfield is denied.

THE DEFENDANT: Okay.

THE COURT: Now, let's turn our attention to this letter than I received from you, Mr. Davila, on, it looks like, January the 29th which states that Mr. Loebl is completely unqualified to handle a federal criminal

trial. That is not accurate. Mr. Loebl has failed to consult adequately with me, [6] failed to forward any of the discovery in the case to me, and has not obtained relevant information which would assist in the preparation of the case.

First of all, he may not distribute discovery material to you. He is specifically required by our local rules not to do that, and we don't want to have discovery material off at the jail where you are being circulated by you and all the other inmates there at the jail. Now he will have to sit with you and go over the discovery material with you. That is the process that we follow here.

Failed to keep you apprised of his pretrial defense preparation. What have you done pretrial in this case, Mr. Loebl? Have you filed any motions in the case?

MR. LOEBL: Yes, Your Honor.

THE COURT: Do you recall without giving me the details what kind of motions you filed?

MR. LOEBL: A ***Brady*** motion, discovery motions.

THE COURT: You filed a ***Brady*** motion? That would tend to me to be an indication that you are concerned about the credibility of the Government's star witness in the case?

MR. LOEBL: Yes, Your Honor. And I have interviewed the Government's witness whom I believe we have referenced there as well, Your Honor.

THE COURT: You have been on medication for a schizoaffective disorder for six years?

[7] THE DEFENDANT: Yes, sir.

THE COURT: And you let Mr. Loebl know that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you think that somehow or another that might be a defense for this case?

THE DEFENDANT: Well my position on that is that I did not knowingly volunteer information to the cops where there are some post arrest statements on there because I was under the influence of medication, and being that I found out later on that the star witness—who the star witness was I was confused on who the star witness was, and now that I know who it is, I know that the allegations aren't true as far as what she is saying.

THE COURT: Well that is all a matter to be determined by a jury at trial. They will decide who is telling the truth and who is not.

The question about this schizoaffective disorder though is this, you are an articulate great writer. You put together some very, I think, precise arguments about various things which indicates to me that you are not incompetent. Clearly you are competent. Now, when we talk about this schizoaffective disorder, however, it might be that you want to argue to the jury that because I have this problem I didn't know that what I

was doing was wrong. Now see that is one way that you can use it. Another way that you might use it would be to [8] say that I am not competent to advise and consult with my attorney during trial that would be another way that that disorder might affect you. But as pointed out by the clerk, we have a competency hearing scheduled in this matter on down the road and we will resolve—we have a psychiatric report, I take it?

THE DEFENDANT: Psychologist.

THE COURT: And that report has been given to you, Mr. Loebl, and to the Government's attorney?

MR. LOEBL: Yes, sir. That is a psychologist report, that's correct.

THE COURT: So you don't need to be sent off to Butner or any other institution for a mental evaluation, I take it, so we are where we are.

Now, Mr. Loebl's participation as your representative in this case talks about the fact that he thinks you ought to plead guilty. Well, you know, oftentimes, Mr. Davila, that is the best advice a lawyer can give his client. In view of whatever the Government's evidence in a case might be, it might be a good idea for the Defendant to accept responsibility for his criminal conduct to plead guilty and go to sentencing with the best arguments on your behalf still available for not wasting the Court's time, not causing the Government to have to spend a bunch of money empanelling a jury to try an open and shut case. All of those are factors that go into the [9] calculation of whether or not you

ought to go to trial or plead guilty. The strength of the Government's case against you would be the primary determinant in that and only a lawyer trained in the law and a lawyer who has had the experience of trying cases and arguing cases to the jury would have the ability to evaluate the strength of the Government's case, and Mr. Loebl of course has done that.

It is his duty as a lawyer to advise you of his expert opinion concerning the strength of the Government's case and whether or not you should plead guilty or not. Only your attorney is competent to do that. And at the same time, it is his duty to advise you of the reasons why you ought to consider a guilty plea in the case. It is also his duty to advise you of the reasons why you shouldn't go to trial in the case. Those are all basically the same considerations.

Insofar as these statements that you may have made or may not have made to the authorities following your arrest, if Mr. Loebl determines that there is a legal and factual basis for filing a motion to suppress those statements I am sure he will do that.

What else does he need to do that he has not done at this point?

THE DEFENDANT: Well, Your Honor, my concern was that the reason why we were going to go forward with a guilty plea was because of cooperation agreement. In the middle of the [10] situation of the plea process he writes me a letter stating that the Government made clear that they were not going to use me for substantial assistance. That is why I am con-

cerned. At that point in time he writes me a letter and he says I will be by to pick up the plea form so you can sign it. To me that was the most important crossroads that an attorney could come and explain to a defendant because now the deal is off. Now they're saying they're not going to do this for me so now what are my options, and the reaction by counsel was just to come in and have me sign an agreement without giving me my options. And relinquishing my innocence you have to do it intentionally. It is protected by the 5th Amendment, Your Honor, and I believe that he should have gave me my options in total. If you go to trial, we can use this kind of defense, if you plead we can use this as a defense, and now I will leave it up to you because really it is about pleading guilty and not guilty and that is a decision that only I can make but he should have gave me the options either way. I understand that he is saying that there is overwhelming but I was a little bit unstable. See, when I went to Fort Worth I had an opportunity to stabilize myself and I got an opportunity to read what little information I have about my case and start understanding. I am not going to stand here in front of the Court saying that I am a good person because you know my rap sheet and you know that I have been through the process, but I also know how far an attorney has to [11] go when it comes to representing me and all I wanted was my options. Don't throw me to the—everything I have told to Mr. Loebl he thinks is frivolous.

THE COURT: So what you are telling me is that there is a provision in your plea agreement requiring you to cooperate?

THE DEFENDANT: There is not.

THE COURT: Oh there is not?

THE DEFENDANT: There is not. That is why I said the deal was off now. That is when the crossroad comes. Now he's got to say, look, they're not going to guarantee you any substantial assistance. Here are your options. Not just come and say, sign the plea; you're going to get her pissed off; she's going to bring her fangs off and she's going to—I understand I've got a bad record but I also understand I've got the choice if it is given to me properly and that is something that effective representation should do.

THE COURT: Well,—

THE DEFENDANT: Your Honor, I have all the letters here that he has forwarded to me. Not even one of them—not even one of these letters talk about a viable defense at all except for pleading guilty.

THE COURT: Well there may not be a viable defense to these charges.

THE DEFENDANT: But we never talked about it. If we [12] never talk about something how can we be sure of something?

THE COURT: What do you say about that, Mr. Loebl?

MR. LOEBL: Your Honor, I have been up to the McDuffie County Jail I believe four times is what I counted when I received this letter. I have been

through the discovery. It is all of it right here or I have given him the opportunity to sit down and go through it with me. At that time we did review the case, and without going into detail as to what Mr. Davila said on anything, it was a joint decision that we would approach the Government and see wh. offer could be made.

THE COURT: Right.

MR. LOEBL: The plea agreement that was, I believe, filed is the only plea agreement that was ever offered. It has not changed, it has as the Court is familiar with the standard cooperation provision, which does anticipate that Mr. Davila could he be given the opportunity to cooperate, and if the Government in its sole discretion deemed it of substantial assistance then it would file the 5K1 or Rule 35(b) motion.

I reiterated to Mr. Davila his options along the way and specifically with respect to the cooperation provision indicated that at least in the federal court system here in the Southern District of Georgia the Government does not approach defense counsel or does not work with defense counsel to reach a set term of years or months and that the Government—

THE COURT: Well you are not allowed to do that anyway

[13]—

MR. LOEBL: Exactly.

THE COURT: —because the district judge will just simply ignore any recommendations along those lines and then not be happy with the lawyers for presuming to tell him what an appropriate sentence in the case is, so go ahead.

MR. LOEBL: All I would just like to say is that we have talked about the case and, again, without going into the specifics, I just disagree with Mr. Davila's characterization that we have not explored the options that are available to him. I am perfectly happy to try the case if Mr. Davila wants to try it and we can require Patricia Rhodes to subpoena all of the bank witnesses and custodians who will come in and go over the discovery and I will have an opportunity to cross-examine Agent Kubala and the secret service agent who I had during the hearing here in front of Your Honor in July or thereabouts and we can do that. And I have advised Mr. Davila that I am happy to do so. I have also recommended to him how I think that will play out and what his best options are under the circumstances.

THE COURT: You can have a seat, Mr. Loebl.

Mr. Davila, here is the situation. Mr. Loebl is the only attorney that is going to be appointed to represent you in this case. If you would like to represent yourself, that is proceed pro se, you may do that. It would be similar to—well, it would just be an act of sheer lunacy for you to do [14] something like that at this point in time. You obviously have a lengthy criminal history which suggests to me that you have had a lot of exposure to the criminal justice system. You are no babe in

the woods. You know what you face in terms of going to trial in this case. You are not a lawyer trained in the law, you don't know what the procedures in this court happen to be. You wouldn't know how to even prepare an exhibit list to submit to the court prior to trial, much less how you would make an opening statement to the jury, how you would make a closing argument to the jury, how to offer the testimony of witnesses or how to cross-examine witnesses that might appear and testify against you. You would not know, for example, the difference between a question that seeks a hearsay response from the witness or a question that seeks an answer that might appear on its face to be hearsay but be one of the exceptions to the hearsay rule. You would not, unfortunately, know anything about the federal sentencing guidelines other than what you may have discerned from Mr. Loebl in your discussions with him but you would, of course, be subjected to a presentence investigation report in the event you are convicted. You would not know how to file objections to the factual findings in the report or the probation officer's application of the guidelines to your individual case. All of those are matters that lawyers trained in the law are capable of doing, but if you want to represent yourself at trial I will be glad to allow you to do that; [15] otherwise, I strongly advise that you make up with Mr. Loebl and recognize the fact that he is a very fine attorney and that he has done the best he can do in this case on your behalf, which is far better than many other attorneys would have done on your behalf.

So, what do you want to do? Do you want to continue with Mr. Loebl as your counsel?

THE DEFENDANT: Yes, I will continue with Mr. Loebl because I am on medication so there is no way I can represent myself.

THE COURT: Well I don't know about the medication. You seem to be doing fine here in front of me today. You are articulate, you are responsive to the Court's questions,—

THE DEFENDANT: In the afternoons.

THE COURT: —you have forcefully stated your position on a couple of occasions. I don't see where you are limited in your communication skills.

THE DEFENDANT: You got to try me in the morning.

THE COURT: Mr. Davila, and I can understand the position that you are in and in the sense that you are kind of operating in the dark, you don't have a lawyer there at your beck and call, you know, and possibly that would be different if you were on the outside but try to understand, the Government, they have all of the marbles in this situation and they can file that 5K1.1 motion for downward departure from the guidelines if [16] they want to, you know, and the rules are constructed so that nobody can force them to file that 5K1.1 for you. The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way

you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance. I don't know what the guidelines of this case would figure out to be but not as bad as armed bank robbery but probably pretty bad because your criminal history score would be so high, but if there was some way that you could cooperate with the Government in this or in other cases and you made the Government aware of that possibility through Mr. Loebl, it is entirely possible that they might send the FBI to you to interview you. Maybe you do know something about some matters that have taken place in other venues involving other types of criminal conduct that you have personal knowledge of that might be of benefit to the Government. I don't know. I don't know. Only you know that but if you could convince them that you had that kind of information, get them to come and interview you, you might have an opportunity to earn that 5K1.1 motion for reduction of sentence exposure under the guidelines. You're the only person that has that key, but make [17] no mistake about it, that two- or three-level reduction for acceptance is something that you have the key to and you can ensure that you get that reduction in sentence simply by virtue of being forthcoming and not trying to make yourself look like you really didn't know what was going on. In order to get the reduction for acceptance, you've got to come to the cross. You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal

history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction.

If there is an issue that needs to be looked into concerning the voluntariness maybe of statements you may have made, I will be glad to look into those things. I will be glad to make a report and recommendation to the district judge, but this kind of stuff is not going to prevent me from doing my job, I can assure you.

All right. Anything else we need to do?

MR. LOEBL: No, Your Honor.

THE COURT: All right. We are adjourned.

(HEARING CONCLUDES)

CERTIFICATION

I certify that the foregoing is a true and correct copy of the hearing held in the matter as transcribed from the official electronic recording.

This the 14th day of Jan., 2011

/s/ C. JOAN MOBLEY
C. JOAN MOBLEY
U.S. District court Reporter
Southern District of Georgia

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

INDICTMENT NO. CR-109-60

UNITED STATES OF AMERICA

v.

ANTHONY DAVILLA

VIOLATIONS	18 U.S.C. § 286 CONSPIRACY
	18 U.S.C. § 287 FALSE CLAIMS
	18 U.S.C. § 1341 MAIL FRAUD
	18 U.S.C. § 1028A AGGRAVATED IDENTIFY THEFT

[Filed May 7, 2009]

INTRODUCTION

At all times relevant to this Indictment:

1. In the Southern District of Georgia and the Middle District of Florida, between January 1, 2005 and December 31, 2007, the Defendant, **ANTHONY DAVILA**, caused to be filed with the Internal Revenue

Service more than 120 false income tax returns in other individuals' names that together claimed over $630,000 in false, fictitious, or fraudulent refunds.

2. The Defendant received from the United States Department of Treasury more than $423,000 as a result of these false returns.

3. The Internal Revenue Service (IRS) was and is an agency of the United States Department of Treasury responsible for administering and enforcing the tax laws of the United States.

4. For tax years 2004, 2005, and 2006, the Defendant prepared and caused to be filed with the IRS false individual tax returns that contained one or more false statements.

COUNT ONE
Conspiracy

5. The allegations of paragraphs 1 through 4 are re-alleged and incorporated by reference as if set forth fully herein.

6. Beginning on or about January 1, 2005 through December 31, 2007 in the Southern District of Georgia, the Middle District of Florida, and elsewhere, the defendant herein,

ANTHONY DAVILA

did combine, conspire, confederate, and agreed together with unindicted co-conspirator J.R., to know-

ingly and willfully defraud the United State Department of Treasury by obtaining and attempting to obtain payment of false claims using the following:

Manner, Means and Overt Acts

7. It was part of the conspiracy that the defendant did use the internet to search the Florida Department of Corrections (FDOC) website and the websites of other state prisons to identify inmates who were serving sentences which generally exceeded 15 years;

8. It was further part of the conspiracy that the defendant did record the names and case numbers of the inmates which he identified;

9. It was further part of the conspiracy that the defendant did contact the county clerk's office which maintained the case files of the inmates defendant had selected, and the defendant did impersonate a law clerk in order to obtain access to these files;

10. It was further part of the conspiracy that, using the clerk's offices files, the defendant did obtain the full names, birth dates, address, and social security numbers of the inmates he had selected;

11. It was further part of the conspiracy that the defendant did search the Florida Corporation website for Employer Identification Numbers (EIN) of large corporations, which he then used to create fictitious W-2 forms in the names of the inmates that the defendant selected;

12. It was further part of the conspiracy that the defendant did then use the fictitious W-2 forms and the fraudulently obtained data on the inmates to create fictitious 1040E2 tax forms.

13. It was further part of the conspiracy that the defendant did forge the signatures of the inmates on the 1040EZ forms and mail said forms to the IRS;

14. It was further part of the scheme that J.R. deposited certain of the false and fictitious returns in the mails.

15. It was further part of the conspiracy that the defendant set up multiple bank accounts in his own name, into which more than $423,000.00 in fraudulently obtained IRS tax refunds were deposited.

All done in violation of Title 18 Unites State Code Sections 286 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNTS TWO THROUGH TWELVE
False Claims

16. The allegations of paragraphs 1through 4 are re-alleged and incorporated by reference as if set forth finally herein.

17. That between on or about the dates as set forth in the table below, in Richmond County within the Southern District of Georgia, the defendant

ANTHONY DAVILA

aided and abetted by another, made and presented to the Internal Revenue Service, false claims upon the United State Department of Treasury, by filing false 1040EZ tax forms supported by fictitious W-2 forms, for tax refunds, knowing that the claims were fraudulent, in that, the defendant used identification information of inmates, as set forth below, who were incarcerated by the Florida Department of Corrections and Employer Identification Numbers (EIN) to create the fictitious W-2 forms and false 1040EZ tax forms. The defendant then submitted these false and fictitious forms for tax refunds, which, if paid by the IRS, were deposited into bank accounts under the control of the defendant. Each of the foregoing allegations is hereby incorporated into each of the following counts as if fully set forth therein:

COUNT	DATE	INMATE	AMOUNT REQUESTED FALSE CLAIM	AMOUNT OF FRAUDULENT REFUND
2	May 10-14, 2007	D.T.H.	$4416.00	Refund Stopped
3	May 21-24, 2007	C.C.	$5152.00	$5269.62
4	May 21-24,	E.D.	$5031.00	$5145.86

	2007			
5	May 21-24, 2007	J.E., Jr.	$5026.00	Refund Returned
6	May 21-24, 2007	A.G.	$4961.00	Refund Stopped
7	May 21-24, 2007	S.H.	$5127.00	Refund Stopped
8	May 21-24, 2007	D.L.S.	$5511.00	$5636.00
9	May 21-24, 2007	J.C.V.M.	$4320.00	$4320.00
10	May 22-25, 2007	J.F.S.	$4966.00	Refund Stopped
11	May 23-29, 2007	S.L.H.	$4952.00	Refund Stopped
12	May 29-31,	J.E.B.	$5406.00	$4986.99

	2007			

All done in violation of Title 18 Unites State Code Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNTS THIRTEEN THROUGH TWENTY-THREE
Mail Fraud 18 U.S.C. § 1341

18. The allegations of paragraphs 1 through 4 are re-alleged and incorporated by reference as if set forth fully herein.

19. That on or before January 1, 2005 and continuing to on or about December 31, 2007, in Richmond County, in the Southern District of Georgia, and elsewhere the defendant,

ANTHONY DAVILA,

aided and abetted by another, knowingly devised, participated, and executed a scheme and artifice to defraud the Internal Revenue Service and to obtain money from the Internal Revenue Service, by means of false and fraudulent pretenses and representations, which were material in that, if believed, they would and did induce the United States to issue income tax refund payments.

20. The fraudulent scheme was carried out by the defendant in the manner as alleged in paragraphs 5 through 15 of this indictment, which are hereby incorporated by reference as if set forth fully herein.

21. On or about the dates set forth below, in the Southern District of Georgia, the defendant, for the purpose of executing and attempting to execute this scheme, placed or caused to be placed in the mail, certain writings, specifically false and fraudulent individual tax return documents. Each of the foregoing allegations is hereby incorporated into each of the following counts as if fully set forth therein:

COUNT	DATE OF MAILING	INITIALS OF PERSON WHOSE NAME WAS USED	MAILING
13	May 10, 2007	D.T.H	Individual Tax Return 1040EZ Form and W-2
14	May 21, 2007	C.C.	Individual Tax Return 1040EZ Form and W-2
15	May 21, 2007	E.D.	Individual Tax Return 1040EZ Form and W-2
16	May 21, 2007	J.E., Jr.	Individual Tax Return 1040EZ Form and W-2

17	May 21, 2007	A.G.	Individual Tax Return 1040EZ Form and W-2
18	May 21, 2007	S.H.	Individual Tax Return 1040EZ Form and W-2
19	May 21, 2007	D.L.S.	Individual Tax Return 1040EZ Form and W-2
20	May 21, 2007	J.C.V.M.	Individual Tax Return 1040EZ Form and W-2
21	May 22, 2007	J.F.S.	Individual Tax Return 1040EZ Form and W-2
22	May 23-29, 2007	S.L.H.	Individual Tax Return 1040EZ Form and W-2
23	May 29-31, 2007	J.E.B.	Individual Tax Return 1040EZ Form and W-2

All done in violation of Title 18, United States Code, Section 1341.

THE GRAND JURY FURTHER CHARGES:

COUNTS TWENTY-FOUR THROUGH THIRTY-FOUR

Aggravated Identity Theft 18 U.S.C. § 1028A

22. The allegations of paragraphs 1 through 4 are re-alleged and incorporated by reference as if set forth fully herein.

23. On or about the dates listed below, in Richmond County, in the Southern District of Georgia, the defendant,

ANTHONY DAVILA,

aided and abetted by another, did knowingly transfer, possess and, use, without lawful authority, means of identification of other persons, that is names and social security numbers, as listed below, during and in relation to mail fraud, a felony violation of Federal law pursuant to 18 U.S.C. 1341, as charged in Counts 13 through 23 of this indictment. Each of the foregoing allegations is hereby incorporated into each of the following counts as if fully set forth therein:

COUNT	PREDICATE FELONY VIOLATION	DATE	INITIALS OF PERSON WHOSE NAME WAS USED	MEANS OF IDENTIFICATION
24	Mail Fraud, as	May	D.T.H.	Name and

	charged in Count 13 of this Indictment	10-14, 2007		Social Security Number xxx-xx-2468
25	Mail Fraud, as charged in Count 14 of this Indictment	May 21-24, 2007	C.C.	Name and Social Security Number xxx-xx-1959
26	Mail Fraud, as charged in Count 15 of this Indictment	May 21-24, 2007	E.D.	Name and Social Security Number xxx-xx-8732
27	Mail Fraud, as charged in Count 16 of this Indictment	May 21-24, 2007	J.E., Jr.	Name and Social Security Number xxx-xx-6847
28	Mail Fraud, as charged in Count 17 of this Indictment	May 21-24, 2007	A.G.	Name and Social Security Number xxx-xx-4931
29	Mail Fraud, as charged in Count 18 of	May 21-24,	S.H.	Name and Social Security Number

	this Indictment	2007		xxx-xx-5086
30	Mail Fraud, as charged in Count 19 of this Indictment	May 21-24, 2007	D.L.S.	Name and Social Security Number xxx-xx-5306
31	Mail Fraud, as charged in Count 20 of this Indictment	May 21-24, 2007	J.C.V.M.	Name and Social Security Number xxx-xx-7314
32	Mail Fraud, as charged in Count 21 of this Indictment	May 22-25, 2008	J.F.S.	Name and Social Security Number xxx-xx-3922
33	Mail Fraud, as charged in Count 22 of this Indictment	May 23-29, 2007	S.L.H.	Name and Social Security Number xxx-xx-7374
34	Mail Fraud, as charged in Count 23 of	May 29-31, 2007	J.E.B.	Name and Social Security Number

	this Indictment			xxx-xx-0569

All done in violation of Title 18, United States Code, Sections 1028A.

A True Bill.

/s/ EDMUND A. BOOTH JR.
EDMUND A. BOOTH, JR.
United States Attorney

/s/ JAMES D. DURHAM
JAMES D. DURHAM
Assistant United States Attorney
Chief, Criminal Division

/s/ CARLTON R. BOURNE, JR.
CARLTON R. BOURNE, JR.
Assistant United States Attorney
Deputy Chief, Criminal Division

/s/ PATRICIA GREEN RHODES
PATRICIA GREEN RHODES
Assistant United States Attorney
Lead Counsel

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY DAVILA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
KATHRYN KENEALLY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
FRANK P. CIHLAR
S. ROBERT LYONS
DEBORAH K. SNYDER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant.

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In the Supreme Court of the United States

No. 12-167

UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 664 F.3d 1355.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2011. A petition for rehearing was denied on April 6, 2012 (Pet. App. 9a-10a). On June 26, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 4, 2012, and the petition was filed on August 3, 2012. The petition was granted on January 4, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 11(c)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

Rule 11(h) of the Federal Rules of Criminal Procedure provides:

> *Harmless error.* A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Rule 52 of the Federal Rules of Criminal Procedure provides:

> (a) *Harmless Error.* Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) *Plain Error.* A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Georgia, respondent was convicted of conspiring to file fraudulent tax-refund claims, in violation of 18 U.S.C. 286. Pet. App. 1a-2a. The district court sentenced respondent to 115 months of imprisonment, to be followed by three years of supervised release. J.A. 77-78. The court of appeals vacated the conviction and sentence, and remanded for further proceedings. Pet. App. 1a-5a.

1. Respondent defrauded the federal government by filing more than 130 falsified tax returns with the Internal Revenue Service (IRS). J.A. 100-107. According to an informant, respondent would identify state prisoners on the Florida Department of Corrections website, obtain the prisoners' personal information from case files at the local courthouse, and then file federal tax-refund claims in the prisoners' names to be paid into his own bank accounts. J.A. 100-102. The IRS issued refunds on 87 of the claims, and respondent banked more than $423,500 as a result of his scheme. J.A. 105.

In May 2009, a federal grand jury in the Southern District of Georgia indicted respondent on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 286 and 2; 11 counts of presenting a false claim to the United States, in violation of 18 U.S.C. 287 and 2; 11 counts of mail fraud, in violation of 18 U.S.C. 1341; and 11 counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. J.A. 162-175. The district court appointed counsel to represent respondent. 09-cr-60 Docket entry No. 33 (S.D. Ga. July 20, 2009).

2. Respondent subsequently sent a letter to the court requesting different counsel. C.A. E.R. Tab B. One of respondent's complaints was that his counsel had "never mentioned a defense at all" other than "to plead guilty." *Id.* at 1-2. On February 8, 2010, a magistrate judge held an ex parte hearing with respondent and his counsel and denied respondent's request. J.A. 145-161.

At the hearing, the magistrate judge stated that "oftentimes * * * the best advice a lawyer can give his client" is to plead guilty. J.A. 152. The magistrate judge also raised the possibility that respondent's counsel might not have discussed other strategies because "there may not be a viable defense to these charges."

J.A. 155. Later in the hearing, the magistrate judge stated that

> [t]he only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance. I don't know what the guidelines of this case would figure out to be but not as bad as armed bank robbery but probably pretty bad because your criminal history score would be so high. * * * [M]ake no mistake about it, that two- or three-level reduction for acceptance is something that you have the key to and you can ensure that you get that reduction in sentence simply by virtue of being forthcoming and not trying to make yourself look like you really didn't know what was going on. In order to get the reduction for acceptance, you've got to come to the cross. You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction.

J.A. 159-161.

3. Approximately a month after the hearing, respondent filed a motion demanding a speedy trial. Docket entry No. 46 (Mar. 5, 2010). The district court found respondent competent to stand trial and set a trial date for April 2010, which was later continued at the government's request. Docket entry No. 52 (Mar. 23, 2010), No. 53 (Mar. 25, 2010), No. 56 (Apr. 2, 2010).

On May 11, 2010, more than three months after the ex parte hearing, respondent and his counsel signed a plea agreement in which respondent agreed to plead guilty to the conspiracy charge in exchange for dismissal of the other 33 charges. J.A. 126-142. Six days later, respondent entered his guilty plea before a district judge (not the magistrate judge who had presided over the ex parte hearing). J.A. 81-125. Respondent stated under oath at the hearing that no one had forced or pressured him to plead guilty. J.A. 122. The district judge found that the plea was "voluntary, knowing, and not the result of any force, pressure, threats, or promises, other than the promises made by the government in the plea agreement." J.A. 123.

4. In September 2010, the magistrate judge granted respondent permission to proceed pro se and appointed his prior counsel as stand-by counsel. See J.A. 57. Respondent then moved to vacate his plea and to dismiss the indictment, contending that the government had knowingly included false statements in the indictment and that his counsel had given him bad advice about whether to admit the factual basis for his plea. Docket entry No. 79 (Sept. 15, 2010), No. 87 (Oct. 26, 2010).

When the district judge considered the motion at the beginning of respondent's sentencing hearing, respondent explained that his guilty plea had been a "strategic decision" designed to expose the alleged government

misconduct. J.A. 58, 61. Respondent also asserted that his plea decision had been influenced by misinformation from his counsel about the effect the plea would have in a separate prosecution against him in another jurisdiction. J.A. 64. Neither respondent's written nor oral submissions in support of his plea-withdrawal request suggested that his decision to plead guilty had been influenced by the magistrate judge's remarks at the ex parte hearing (or even mentioned those remarks at all). See Docket entry Nos. 79, 80, 84, 87; J.A. 58-65.

The district judge declined to set aside the plea, finding that respondent had "failed to provide * * * any evidence of government misconduct" and finding it "clear * * * that the entry of the guilty plea * * * was knowing and voluntary." J.A. 69-72. The district judge sentenced respondent to 115 months of imprisonment. J.A. 77.

5. The court of appeals assigned respondent's trial counsel to represent him on appeal. 10-15310 Docket entry (11th Cir. Nov. 29, 2010). Pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), respondent's counsel filed a motion to withdraw and a brief explaining why no nonfrivolous grounds for appeal existed. 10-15310 Docket entry (11th Cir. Apr. 4, 2011). Respondent filed his own pro se brief seeking to set aside his conviction. 10-15310 Docket entry (11th Cir. Apr. 22, 2011).

The court of appeals denied counsel's *Anders* motion and ordered further briefing on an issue that neither respondent nor his counsel had identified in their briefs. Pet. App. 6a-8a. Specifically, the court stated that its "independent review" of the record had "revealed an irregularity in the statements of a magistrate judge, made during a hearing prior to [respondent's] plea, which appeared to urge [respondent] to cooperate and

be candid about his criminal conduct to obtain favorable sentencing consequences." *Id.* at 7a. The court requested that respondent's counsel address whether this amounted to reversible error under Federal Rule of Criminal Procedure 11(c)(1), which states that a court "must not participate in [plea] discussions." See Pet. App. 7a-8a.

Respondent (through his counsel) then filed a brief requesting that his guilty plea be set aside on the ground suggested by the court. Resp. C.A. Br. 17-45. He argued that the magistrate judge's comments violated Rule 11(c)(1) and warranted relief even under the plain-error standard of review generally applicable to errors raised for the first time on appeal. *Ibid.* In response, the government conceded that the magistrate judge's comments had violated Rule 11(c)(1), but contended that respondent could not meet the plain-error standard's requirement that he show an effect on his substantial rights as a prerequisite to relief. Gov't C.A. Br. 11-26. In particular, the government contended that respondent could not show "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 15 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004)); see *id.* at 14-26. The government pointed out the three-month gap between the comments and the plea; the different judge who presided over the plea and sentencing hearings; respondent's denial at the plea hearing that anyone had pressured or coerced his plea; respondent's later explanation to the district judge that he had pleaded guilty for "strategic" reasons; and the failure of either respondent or his counsel to identify the issue before the court of appeals raised it. *Id.* at 11-12.

6. The court of appeals vacated respondent's conviction and remanded the case with instructions that it be reassigned to a different district judge. Pet. App. 5a. The court recognized that "[w]here, as here, the defendant fails to object to an asserted Rule 11 violation before the district court, we review the alleged violation for plain error." *Id.* at 3a. And it explained that "[u]nder the plain error standard, the defendant ordinarily must show that: (1) error existed (2) the error was plain, and (3) it affected the defendant's substantial rights; and (4) it seriously affected the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks and citation omitted).

The court of appeals nevertheless relied on circuit precedent to hold that in a case of Rule 11(c)(1) error, a defendant "need not show any individualized prejudice" to obtain relief. Pet. App. 5a. The court explained that, in its view, "Rule 11(c)(1) states a 'bright line rule': it prohibits 'the participation of the judge in plea negotiations under any circumstances . . . and admits of no exceptions.'" *Id.* at 3a (brackets omitted) (quoting *United States* v. *Johnson*, 89 F.3d 778, 783 (11th Cir. 1996)). "Thus," it continued, "'judicial participation *is plain error, and the defendant need not show actual prejudice.*'" *Ibid.* (quoting *United States* v. *Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993) (per curiam)) (brackets omitted). The court acknowledged that "while other circuits recognize harmless error in the context of judicial participation, we do not." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erroneously granted appellate relief to respondent without determining whether he was prejudiced by the magistrate judge's violation of Rule 11(c)(1)'s prohibition on judicial participation in

plea discussions. The court of appeals' judgment should be vacated and the case remanded for application of the proper plain-error standard.

Appellate relief for a violation of Rule 11(c)(1) is contingent on a determination that the error "affect[ed] substantial rights," thereby prejudicing the defendant. Fed. R. Crim. P. 52(a)-(b). Any possible doubt about the applicability of prejudice analysis to Rule 11 errors is eliminated by Rule 11(h), which expressly provides that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." This Court's decisions additionally make clear that when a defendant fails to raise a timely objection in district court, a claim of Rule 11 error on appeal is subject to the plain-error standard of Rule 52(b). *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004); *United States* v. *Vonn*, 535 U.S. 55 (2002). That standard requires the defendant to establish, as one of the prerequisites for relief, "a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83.

The court of appeals erred in dispensing with the prejudice inquiry in favor of automatically granting appellate relief following any degree of judicial participation in plea negotiations. Courts have no authority to disregard the plain text of the Federal Rules of Criminal Procedure, and Rule 11(h) was enacted for the precise purpose of making clear that courts should not reflexively grant relief whenever Rule 11 is violated. Violations of Rule 11(c)(1) do not qualify as "structural" errors for which relief may be appropriate even in the absence of prejudice, as the narrow class of such errors consists almost exclusively of fundamental constitutional errors and does not include violations of prophylactic proce-

dural rules with their own harmless-error provisions. Dispensing with prejudice analysis for Rule 11(c)(1) errors unjustifiably disrupts the finality of guilty pleas, provides a potential windfall for defendants who elect not to mention the error until after sentencing, and deprives the government of the benefit of untainted pleas based on judicial mistakes that the government was powerless to prevent.

Respondent could not have met his burden to show prejudice in this case. Not only did he represent to the district court that his plea was uncoerced, and not only did he fail to raise the magistrate judge's comments until the court of appeals identified them *sua sponte*, but the procedure he received in the district court following the error—the passage of time (three months) and a different judge (the district judge) at the plea and sentencing proceedings—is effectively identical to the appellate remedy that respondent and the court of appeals agree would remove any taint of Rule 11(c)(1) violation. The court of appeals erred in disregarding these facts, and the case should be remanded for application of the prejudice analysis required by both the Federal Rules and this Court's decisions.

ARGUMENT

A VIOLATION OF RULE 11(c)(1) DOES NOT REQUIRE VACATUR OF A GUILTY PLEA IF THE ERROR DID NOT PREJUDICE THE DEFENDANT

A. The Harmless-Error And Plain-Error Standards Of Review Require Prejudice As A Prerequisite To Appellate Relief For A Rule 11(c)(1) Error

1. An appellate court's authority to set aside a criminal conviction based on an error typically "is tied in some way" to whether the error prejudiced the defend-

ant. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004). Rule 52 of the Federal Rules of Criminal Procedure permits a reviewing court to grant relief only when an error has "affect[ed] substantial rights," Fed. R. Crim. P. 52(a)-(b), a phrase that this Court has long "taken to mean error with a prejudicial effect on the outcome of a judicial proceeding," *Dominguez Benitez*, 542 U.S. at 81 (citing *Kotteakos* v. *United States*, 328 U.S. 750 (1946)). "When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). If the defendant did not make a timely objection, then Rule 52(b)'s plain-error standard "normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.*; see *id.* at 732 (defendant must also demonstrate that the error was "plain" and "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings") (citations omitted).

The harmless-error and plain-error prejudice standards apply with full force when the error at issue is a violation of Federal Rule of Criminal Procedure 11. Rule 11 describes the procedures for pleas in criminal cases, including the requirement that a district court, before accepting a guilty plea, advise the defendant of various rights and determine that the defendant understands important features of the case. Fed. R. Crim. P. 11(b). The Rule also authorizes the defendant and the government to "discuss and reach a plea agreement," but requires that a "court must not participate in these

discussions." Fed. R. Crim. P. 11(c)(1). Nothing in Rule 11 in general, or Rule 11(c)(1) in particular, creates an exception to Rule 52's requirement of prejudice as a prerequisite for appellate relief. See *United States* v. *Vonn*, 535 U.S. 55, 65 (2002) (observing that an implied repeal in the context of Rule 52(b) would be "sufficiently disfavored * * * as to require strong support").

2. To the contrary, Rule 11 expressly "instructs that not every violation of its terms calls for reversal of conviction by entitling the defendant to withdraw his guilty plea." *Dominguez Benitez*, 542 U.S. at 80. Subsection (h) of Rule 11 specifically provides that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." The Advisory Committee Notes explain that Rule 11(h) "makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11 advisory committee's note (1983); see *Vonn*, 535 U.S. at 64 n.6 (stating that advisory committee notes are a "reliable source of insight into the meaning of" Rule 11(h)).

The scope of Rule 11(h) expressly encompasses all potential variances from the "rule," which would include violations of Subsection 11(c)(1)'s prohibition against judicial participation in plea negotiations. The original 1983 version of Rule 11(h) explicitly provided that "*[a]ny* variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h) (1983) (emphasis added); see *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). The breadth of Rule 11(h) remains unchanged following a 2002 amendment that replaced "[a]ny variance" with "[a]

variance," as the alteration was "intended to be stylistic only." Fed. R. Crim. P. 11 advisory committee's note (2002); see *Dominguez Benitez*, 542 U.S. at 78 n.3 (noting that Rule 11(h) received only a "stylistic amendment").

Although Rule 11(h) specifically addresses only the applicability of harmless-error review, this Court has held that Rule 11 violations are also subject to plain-error review under Rule 52(b). In *United States* v. *Vonn*, *supra*, the Court "considered the standard that applies when a defendant is dilatory in raising Rule 11 error, and held that reversal is not in order unless the error is plain." *Dominguez Benitez*, 542 U.S. at 80; see *Vonn*, 535 U.S. at 62-74. The Court expanded on *Vonn* in *United States* v. *Dominguez Benitez*, *supra*, explaining that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. "[R]elief on direct appeal, given the plain-error standard that will apply in many cases, will be difficult to get, as it should be." *Id.* at 83 n.9.

B. The Court Of Appeals' Automatic-Vacatur Approach To Rule 11(c)(1) Errors Is Insupportable

Under the court of appeals' approach, relief on appeal is not "difficult to get," *Dominguez Benitez*, 542 U.S. at 83 n.9, but is instead automatic, in cases where a district court is found to have participated in plea discussions in violation of Rule 11(c)(1). The court of appeals has explained that it does not "recognize harmless error in the context of judicial participation." Pet. App. 3a. Nor does it require a defendant who has forfeited his judicial-participation claim to show "any individualized prej-

udice" or "actual prejudice" to prevail on plain-error review. *Id.* at 3a-5a (internal quotation marks, citation, and emphasis omitted). Nothing justifies the court of appeals' categorical excision of the prejudice inquiry that Rules 11(h) and 52 require.

1. ***Rule 11(c)(1) errors are not necessarily prejudicial***

Respondent has defended the court of appeals' approach by characterizing it as folding the prejudice component of plain-error review into the assessment of whether a Rule 11(c)(1) violation occurred at all. See Br. in Opp. 8-14. That defense is untenable. Rule 11(c)(1) does not, and could not, incorporate the type of prejudice analysis that Rules 11(h) and 52 contemplate.

Prejudice analysis under Rules 11(h) and 52 is retrospective. This Court has made clear that in evaluating the prejudicial effect of a Rule 11 error, the reviewing court "may consult the whole record," *Vonn*, 535 U.S. at 59, including any "evidence indicating the relative significance of * * * facts that may have borne on [the defendant's] choice regardless of any Rule 11 error," *Dominguez Benitez*, 542 U.S. at 84. That whole-record review encompasses, as "relevant considerations," events that occurred only *after* the Rule 11 violation, such as a defendant's statements at sentencing. *Id.* at 85.

Rule 11(c)(1) itself, however, is forward-looking. It prescribes a procedure for courts to follow in cases involving plea negotiations, and, like many prophylactic procedural rules, its primary purpose is to prevent violations from occurring in the first place. Because a judge needs to know ahead of time whether certain comments would be permissible, the question whether comments violate Rule 11(c)(1) cannot depend on the retrospective inquiry into whether a defendant could "satisfy the

judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Dominguez Benitez*, 542 U.S. at 83 (internal quotation marks and citation omitted).

The court of appeals appreciated the difference between the focused inquiry into whether a district court participated in plea negotiations (the province of Rule 11(c)(1)) and the whole-record inquiry into whether such participation affected the outcome of the proceeding so as to warrant appellate relief (the province of Rule 52). It consciously dispensed with the latter inquiry. While the decision below expressly analyzed whether the magistrate judge's comments violated Rule 11(c)(1), Pet. App. 3a-4a, it deliberately excused respondent from having to "show any individualized prejudice" to obtain appellate relief, *id.* at 5a; see *id.* at 3a.

Nowhere did the decision address the government's argument—made at length in its appellate brief—that respondent could not show "a reasonable probability that, but for the error, he would not have entered the plea" because (1) three months elapsed between the magistrate judge's comments and the plea (during which respondent expressly requested a speedy trial); (2) a different judge presided over the plea and sentencing; and (3) respondent expressly denied any coercion or pressure to plead, represented that he had pleaded for strategic reasons, and did not raise the magistrate judge's comments (either on his own or through counsel) until the court of appeals uncovered them. Gov't C.A. Br. 15 (quoting *Dominguez Benitez*, 542 U.S. at 83); see *id.* at 11-12, 15-19. Instead, all that mattered to the court of appeals was that "the magistrate judge's comments * * * amounted to judicial participation in plea

discussions" and respondent "pled guilty after these comments were made." Pet. App. 5a. That narrow inquiry was an inappropriate substitute for the broad-based prejudice analysis that Rule 11(h), Rule 52, *Vonn*, and *Dominguez Benitez* all demand.

2. Courts lack authority to disregard Rules 11(h) and 52

a. The court of appeals' automatic-vacatur approach appears to be premised on the erroneous belief that it has authority to substitute its own judgment in place of the text of the Federal Rules of Criminal Procedure. The court of appeals supported its approach by citing two prior circuit decisions, *United States* v. *Casallas*, 59 F.3d 1173 (11th Cir. 1995), and *United States* v. *Corbitt*, 996 F.2d 1132 (11th Cir. 1993) (per curiam). Pet. App. 3a. Those decisions, in turn, cite *United States* v. *Adams*, 634 F.2d 830 (5th Cir. Unit A Jan. 1981), a precedent from the court's origins as part of the Fifth Circuit. See *Casallas*, 59 F.3d at 1177 & n.8; *Corbitt*, 996 F.2d at 1134-1135; see also *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting Fifth Circuit cases decided before October 1, 1981, as binding precedent).

In *Adams*, the Fifth Circuit relied on its "supervisory power over the district courts" to hold that a defendant was entitled to automatic appellate relief when a district court had participated in plea discussions. 634 F.2d at 835-843. The decision's reasoning drew heavily on *McCarthy* v. *United States*, 394 U.S. 459 (1969), in which this Court had used its supervisory authority to vacate a plea following a plea-colloquy omission that violated a very early version of Rule 11. *Id.* at 464, 468-472; see *Adams*, 634 F.2d at 836-842. The reasoning and result in *Adams* were consistent with other contemporaneous decisions in which some circuits "felt bound to treat all

Rule 11 lapses as equal and to read *McCarthy* as mandating automatic reversal for any one of them." *Vonn*, 535 U.S. at 70.

Those circuit decisions, however, "imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified, and by 1983 the practice of automatic reversal for error threatening little prejudice to a defendant or disgrace to the legal system prompted further revision of Rule 11." *Vonn*, 535 U.S. at 70. That revision was Rule 11(h), which expressly prohibits reviewing courts from granting relief for Rule 11 errors that do not affect substantial rights. *Ibid.*; see Fed. R. Crim. P. 11 advisory committee's note (1983). "[T]he one clearly expressed objective of Rule 11(h) was to end the practice * * * of reversing automatically for any Rule 11 error" based on an "expansive reading of *McCarthy*." *Vonn*, 535 U.S. at 66; see Fed. R. Crim. P. 11 advisory committee's note (1983) ("[A] harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings."); see also *Dominguez Benitez*, 542 U.S. at 80 n.5.

Following the enactment of Rule 11(h), the Fifth Circuit has recognized that its decision in *Adams* is no longer good law. Nearly two decades ago, the Fifth Circuit observed that, notwithstanding *Adams*, Rule 11(h) and a recent en banc decision "compel[led] harmless error review" of "a guilty plea entered after judicial participation." *United States* v. *Miles*, 10 F.3d 1135, 1140-1141 (1993) (citing *United States* v. *Johnson*, 1 F.3d 296 (5th Cir. 1993) (en banc)). The Eleventh Circuit, however, has continued to adhere to *Adams*, without attempting to reconcile its automatic-vacatur ap-

proach with Rule 11(h). Pet. App. 3a; see, *e.g.*, *Casallas*, 59 F.3d at 1177 n.8 ("[W]e are bound by *United States* v. *Adams*.").

The Eleventh Circuit appears to believe that *Adams* is still correct because, in its view, the *substantive* prohibition on judicial participation is "absolute" and "'admits of no exceptions.'" *Corbitt*, 996 F.2d at 1135 (quoting *United States* v. *Bruce*, 976 F.2d 552, 558 (9th Cir. 1992)); see, *e.g.*, *id.* at 1134-1135 (citing *Adams*, *Bruce*, and *United States* v. *Barrett*, 982 F.2d 193 (6th Cir. 1992)). But Rule 11(h) clarifies that the availability of a *remedy* for a Rule 11 error is *not* absolute and *does* admit of exceptions—in particular, when the error did not prejudice the defendant. See, *e.g.*, Rule 11 advisory committee's note (1983) ("[E]ven when it may be concluded that Rule 11 has not been complied with in all respects, it does not inevitably follow that the defendant's plea of guilty or nolo contendere is invalid and subject to being overturned by any remedial device then available to the defendant.").

b. Courts of appeals have no authority to override Rule 11(h) and continue the prior practice of reversing even in the absence of prejudice. In *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), this Court squarely rejected the proposition that a federal court can "invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." *Id.* at 254. The Court explained that, pursuant to the relevant statutes governing the promulgation of federal criminal rules, Rule 52(a) "is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do

to disregard constitutional or statutory provisions." *Id.* at 255.

The same logic necessarily applies to Rule 11(h), which simply "makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11 advisory committee's note (1983). The logic likewise applies to the plain-error requirements of Rule 52(b). This Court has specifically recognized that it has "no authority" to "creat[e] out of whole cloth an exception" to the plain-error rule. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997).

Respondent has nonetheless argued (Br. in Opp. 31), citing *Nguyen* v. *United States*, 539 U.S. 69 (2003), that the court of appeals' automatic-vacatur approach can be justified on the basis of its supervisory authority. In *Nguyen*, this Court found prejudice analysis unnecessary in the context of an erroneously constituted appellate panel, explaining its departure from the *Bank of Nova Scotia* rule on the ground that the error at issue "involve[d] a violation of a statutory provision that 'embodies a strong policy concerning the proper administration of judicial business.'" *Id.* at 81 (quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)). That ground is nonexistent here. The error in this case does not involve the statutory authority of a particular decisionmaker to adjudicate a case. See *Rivera* v. *Illinois*, 556 U.S. 148, 161 (2009) (describing *Nguyen* as part of a "set of cases involv[ing] circumstances in which federal judges or tribunals lacked statutory authority to adjudicate the controversy"). It is instead a violation of a rule prescribing how a court should conduct certain proceedings. If courts were free to disregard harmless-error and plain-error principles for that latter sort of violation, then those principles would have little (if any)

application. Cf. *Nguyen*, 539 U.S. at 81 n.12 (noting that the error in *Nguyen* was "an isolated, one-time mistake") (citation omitted). Any extension of *Nguyen*, moreover, should certainly have no application to Rules, like Rule 11, that contain their own specific harmless-error provisions. See Fed. R. Crim. P. 11(h).

3. ***Rule 11(c)(1) errors are not structural***

a. This Court has explained that "[i]t is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that * * * error requires reversal without regard to the mistake's effect on the proceeding." *Dominguez Benitez*, 542 U.S. at 81. The Court has found only "a very limited class of errors" to be structural. *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (internal quotation marks and citation omitted). That limited class—which includes, for example, denial of counsel of choice, denial of self-representation, denial of a public trial, and denial of a reasonable-doubt instruction, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006)—does not include Rule 11(c)(1) errors or any other type of Rule 11 error. Indeed, the Court has expressly observed that the erroneous omission of one of Rule 11's required plea-colloquy warnings is not even "colorably structural." *Dominguez Benitez*, 542 U.S. at 81 n.6.

Almost invariably, structural errors are (1) "fundamental constitutional errors" that (2) "defy analysis by harmless error standards" because they "affect[] the framework within which the trial proceeds." *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999) (internal quotation marks and citations omitted). Rule 11 errors satisfy neither condition. First, Rule 11 is not "constitutionally mandated," but is instead a prophylactic rule "designed to assist" in assuring "that a defendant's guilty plea is

truly voluntary." *McCarthy*, 394 U.S. at 465; see *Halliday* v. *United States*, 394 U.S. 831, 833 (1969) (per curiam) ("[A] large number of constitutionally valid convictions * * * may have been obtained without full compliance with Rule 11."). Before the Rule was amended in 1974 to preclude judicial participation in plea discussions, some commentators described such participation as "common practice," and the amendment reflected a policy choice rather than a constitutional imperative. Fed. R. Crim. P. 11 advisory committee's note (1974). Because Rule 11's requirements lack constitutional dimension, a "formal violation" of the Rule is not constitutional error, *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979), and *a fortiori* is not "fundamental constitutional error[ ]," *Neder*, 527 U.S. at 7.

Second, Rule 11 error does not "infect" the entire guilty-plea process, but is simply an error in the plea process itself. See *Neder*, 527 U.S. at 8 (citation omitted) (jury instruction error). "[T]he concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Timmreck*, 441 U.S. at 784 (citation omitted). Case-specific prejudice analysis, rather than an irrebuttable presumption of prejudice, is the best way to address concerns (see Pet. App. 3a-4a; Br. in Opp. 30) that judicial commentary on plea discussions may coerce a defendant to plead or cast doubt on the judge's impartiality. Such analysis permits the reviewing court to go beyond the bare fact of judicial participation and to examine both the specific comments made by the judge and any other individualized circumstances that might show how those comments did or did not affect the particular proceedings. See *Dominguez Benitez*, 542 U.S. at 84-85; *Vonn*, 535 U.S. at 74-75. The

reviewing court may find, for example, that the judge's comments merely expressed what was already obvious to the negotiating parties, were entirely neutral, or even discouraged the defendant from pleading. Or, as in this case, any taint of the error could have been removed by the passage of time and a change of judges. See Part C, *infra*.

b. Respondent has nevertheless suggested (Br. in Opp. 29) that a Rule 11(c)(1) error should "qualify as structural." In his view, the only prerequisites to classifying an error as structural are the "difficulty of assessing the effect of the error" and the "irrelevance of harmlessness," and he asserts that Rule 11(c)(1) errors satisfy both of them. *Ibid.* (quoting *Gonzalez-Lopez*, 548 U.S. at 149 n.4).

As a threshold matter, respondent draws those criteria from a discussion of the criteria for finding a *constitutional* error to be structural. See *Gonzalez-Lopez*, 548 U.S. at 148-149 & n.4 (discussing the Court's division of "constitutional errors into two classes," namely, "trial error" and "structural error"). This Court has occasionally found certain errors to be structural without specifically addressing whether those errors have constitutional dimension. See *Gomez* v. *United States*, 490 U.S. 858, 859-860, 876 (1989) (violation of statutory prohibition against assigning a magistrate judge to "duties * * * inconsistent with the Constitution and laws of the United States," where magistrate presided over voir dire of a felony jury trial without the parties' consent) (citation omitted); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 & n.21 (1987) (plurality opinion) (court appointment of interested party as prosecutor for contempt). But to the government's knowledge, this Court has never treated the

violation of a prophylactic rule of criminal procedure—let alone one with its own built-in harmless-error provision—as structural error warranting per se reversal.

To the extent that such treatment would even be conceivable, it is far from clear that the criteria identified by respondent would be the only relevant considerations. Text and legislative intent, for example, would also logically play a role, and those considerations would foreclose any conclusion that Rule 11(c)(1) errors are structural. Fed. R. Crim. P. 11(h); Rule 11 advisory committee's note (1983); pp. 12-13, 17, *supra*. But even accepting respondent's premise that the text and legislative history can be ignored, a Rule 11(c)(1) error does not satisfy the criteria he identifies.

First, the prejudice inquiry into Rule 11(c)(1) errors is not so difficult as to justify dispensing with the inquiry entirely. Prejudice analysis of judicial participation in plea negotiations generally requires determining the effect of a discrete event or set of events (the judge's comments) on a later decision (to plead guilty). That sort of prejudice analysis is similar to the prejudice analysis required in a number of other contexts, including determining the effect of other types of Rule 11 violations on a defendant's guilty-plea decision, see *Dominguez Benitez*, 542 U.S. at 83; the effect of a lawyer's deficient advice on a guilty-plea decision, see *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985); or the effect of improper prosecutorial comments on a jury's decision to convict, *United States* v. *Young*, 470 U.S. 1, 20 (1985). The government is unaware of any special difficulties experienced by the courts of appeals that do apply prejudice analysis to Rule 11(c)(1) errors. Although some courts have expressed the view that judicial-participation errors are likely to be prejudicial, see, *e.g.*,

United States v. *Bradley*, 455 F.3d 453, 463 (4th Cir. 2006), they nonetheless undertake the analysis, and courts sometimes conclude that an error was non-prejudicial, see, *e.g.*, *United States* v. *Pagan-Ortega*, 372 F.3d 22, 28 (1st Cir. 2004) (finding no prejudice under plain-error standard); *United States* v. *Ebel*, 299 F.3d 187, 191-192 (3d Cir. 2002) (finding no prejudice under harmless-error standard).

Second, respondent errs in asserting (Br. in Opp. 30) that Rule 11(c)(1) errors "are worth correcting even if they cause no discernible harm to the defendant." Respondent offers no meaningful support for his suggestion that every technical violation of Rule 11(c)(1) should automatically be deemed to have "undermine[d] 'the integrity of the judicial process,'" even in the absence of a reasonable probability that the judicial participation caused the defendant's plea decision. Br. in Opp. 30 (quoting Pet. App. 4a). Certain types of judicial inquiries into plea negotiations are not only permissible, but beneficial. This Court has recently encouraged judges to inquire into the plea-negotiation process, including the defendant's understanding of the "advantages and disadvantages of accepting" the plea, in order to ensure that the plea is not the product of ineffective assistance of counsel. *Missouri* v. *Frye*, 132 S. Ct. 1399, 1406-1407 (2012). The line between salutary judicial inquiry and impermissible judicial participation cannot be so razor-thin that the integrity of the proceeding is irrevocably destroyed, and vacatur of the plea is automatically required, whenever a judge inadvertently strays just a bit too far.

This Court rejected a structural-error argument similar to respondent's in *Puckett* v. *United States*, 556 U.S. 129 (2009). The defendant in that case unsuccess-

fully sought an exception to plain-error review for government breaches of plea agreements. *Id.* at 134-143. This Court concluded that such errors were not structural, see *id.* at 140-143, specifically rejecting (among other things) the contention that such errors necessarily "called into question" the "integrity of the system," *id.* at 142-143. The Court "emphasized that a '*per se* approach to plain-error review is flawed,'" *id.* at 142 (quoting *Young*, 470 U.S. at 17 n.14); observed that "countervailing factors in particular cases" may demonstrate that the integrity of the proceedings was unaffected, *id.* at 143; and explained that the inquiry is best "applied on a case-specific and fact-intensive basis," *id.* at 142. "[T]he seriousness of the error claimed," the Court stressed, "does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure" that require prejudice analysis. *Id.* at 143 (quoting *Johnson*, 520 U.S. at 466). If that is true for the constitutional error at issue in *Puckett*, it is surely true for the rule-based error at issue here.

4. ***The court of appeals' approach unnecessarily undermines the finality of guilty pleas***

This Court has "repeatedly cautioned that 'any unwarranted extension' of the authority granted by Rule 52(b) [to recognize forfeited errors] would disturb the careful balance it strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135-136 (brackets omitted) (quoting *Young*, 470 U.S. at 15). The harmless-error component of Rule 52 likewise reflects a considered "balance * * * between societal costs and the rights of the accused," *Bank of Nova Scotia*, 487 U.S. at 255, and that same balance is expressly incorporated into Rule 11 by Subsection (h). The court of appeals' automatic-vacatur approach upends these consid-

ered judgments and "impose[s]" the very sort of "cost on Rule 11 mistakes" that all of these Rules seek to avoid. *Vonn*, 535 U.S. at 70.

Automatic vacatur of a guilty plea for any Rule 11(c)(1) error fails to "respect the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt in open court, and are indispensable in the operation of the modern criminal justice system." *Dominguez Benitez*, 542 U.S. at 82-83. Guilty pleas account for 97% of federal criminal convictions. *Frye*, 132 S. Ct. at 1407. Because of the importance of guilty pleas to the administration of justice, this Court has warned against the creation of unjustified inroads into their finality. See *Vonn*, 535 U.S. at 72; *Timmreck*, 441 U.S. at 784. The "chief virtues" of the plea system—"speed, economy, and finality"—are undermined if an error that did not affect the outcome nevertheless results in the vacatur of a defendant's guilty plea and the remand of the case for further proceedings. *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). The disruption is particularly acute when such relief is granted even in the absence of timely objection, as it allows a defendant to reserve an objection and then strategically raise it for the first time on appeal if he is unhappy with his sentence.

Automatic vacatur for Rule 11(c)(1) errors also presents special problems for the government because the government has little, if any, way to prevent such errors from occurring. District courts can and do discuss certain aspects of the plea with the defendant. See, *e.g.*, *Frye*, 132 S. Ct. at 1406-1407 (court can assure effective assistance of counsel by establishing defendant's understanding of, *inter alia*, the "advantages and disadvantages" and "sentencing consequences" of the plea).

The government cannot predict with any precision what the court will say to a defendant, and courts will sometimes stray into commentary that violates Rule 11(c)(1). Courts may also violate Rule 11(c)(1) during proceedings from which the government is absent: in this case, for example, the colloquy that crossed the line occurred at an ex parte hearing involving only respondent and his counsel. Yet under the automatic-vacatur approach, the government in every case loses the benefit of its plea agreement and must bear the cost of further proceedings.

C. This Court Should Remand To Allow The Court Of Appeals To Apply Prejudice Analysis

1. On a correct understanding of the plain-error standard, the court of appeals erred in vacating respondent's plea. Although the government has conceded that the magistrate judge's comments violated Rule 11(c)(1) (and that the error was plain), the procedural history of this case demonstrates that those comments had no appreciable impact on respondent's decision to plead guilty. See *Dominguez Benitez*, 542 U.S. at 83 (requiring defendant to show "a reasonable probability that, but for the error, he would not have entered the plea"). Respondent filed a motion demanding a speedy trial after the magistrate judge made the comments; he never mentioned the comments when he asked the district court to set aside his plea, but instead explained that he had pleaded for "strategic" reasons; and he did not even think to argue judicial-participation error on appeal until the court of appeals, after an "independent review" of the record, specifically requested briefing on that subject. See pp. 6-7, *supra*.

Moreover, any effect the comments might have had was dissipated by the three-month interval between the

comments and the plea and by the absence of the magistrate judge from the plea and sentencing proceedings (over which the district judge presided). Gov't C.A. Br. 3-6. Even the court of appeals and respondent appear to agree that the passage of time and a new judge are sufficient to cure judicial-participation error, as that is the appellate remedy granted for such error. Pet. App. 5a. When a defendant, like respondent here, has already effectively received that remedy, an appellate-court order requiring further proceedings before yet another judge wastes resources and accomplishes nothing.

2. Nothing would formally preclude this Court from resolving the prejudice inquiry in this case in the course of answering the question presented. But the Court's typical practice in cases where a court of appeals has failed to properly apply the plain-error test is to remand for further proceedings under the correct legal standard. See *Marcus*, 130 S. Ct. at 2167; *Dominguez Benitez*, 542 U.S. at 86; *Vonn*, 535 U.S. at 76. A similar disposition would be warranted here.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
KATHRYN KENEALLY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
FRANK P. CIHLAR
S. ROBERT LYONS
DEBORAH K. SNYDER
Attorneys

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 12-167

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY DAVILA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

J. Pete Theodocion
J. PETE THEODOCION, P.C.
507 Walker Street
Augusta, GA 30901

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Robert M. Yablon
Mary Kelly Persyn
David W. A. Spencer
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Respondent

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Court of Appeals correctly set aside the guilty plea of a defendant who had been pressured to plead guilty by a magistrate judge acting in clear violation of Federal Rule of Criminal Procedure 11(c)(1), which prohibits courts from participating in plea discussions.

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STATEMENT

Respondent Anthony Davila pleaded guilty in May 2010 to one count of conspiring to defraud the government in violation of 18 U.S.C. § 286. Mr. Davila initially was adamant about his desire to exercise his right to go to trial. He reluctantly changed his mind only after a magistrate judge did what Federal Rule of Criminal Procedure 11(c)(1) categorically forbids. That Rule states: "An attorney for the government and the defendant's attorney ... may discuss and reach a plea agreement. The court must not participate in these discussions." Ignoring this flat prohibition, the magistrate judge implored Mr. Davila to "come to the cross," admit everything, and negotiate a plea agreement. Mr. Davila now seeks to vacate his tainted plea.

A federal grand jury in the Southern District of Georgia indicted Mr. Davila on 34 fraud-related charges in May 2009. J.A. 162-74. The indictment included 11 counts each of making false claims to the IRS, mail fraud, and aggravated identity theft, all arising out of 11 instances in which Mr. Davila allegedly sought to collect improper income tax refunds by submitting sham returns in other people's names. The 11 returns were allegedly prepared and submitted in Richmond County, Georgia, in May 2007. According to the indictment, Mr. Davila improperly collected some $25,000 from the government as a result of this conduct. *See* J.A. 165-67.

The remaining count was the conspiracy charge to which Mr. Davila ultimately pleaded guilty. The scope of the alleged conspiracy extended well beyond

the indictment's substantive counts. According to the indictment, during a three-year period from approximately January 1, 2005 to December 31, 2007, Mr. Davila, acting in both Florida and Georgia, filed more than 120 false tax returns and received some $423,000 in refunds from the IRS. *See* J.A. 163-65. The only allegation of coordinated criminality was that an unindicted co-conspirator (who had later become an informant) supposedly dropped "certain of the false and fictitious returns" in the mail. J.A. 165.

Mr. Davila was arrested and appeared before a magistrate judge on June 1, 2009. The magistrate judge appointed counsel, and Mr. Davila entered a plea of not guilty. The following week, the magistrate judge conducted a detention hearing and granted the government's motion to hold Mr. Davila without bond pending trial. During the hearing, a government investigator testified that the unindicted co-conspirator, Jennifer Rodriguez, had claimed to have mailed "some" of the 11 returns from May 2007 that formed the basis of the substantive counts. Docket Entry 50, at 22 (filed Mar. 18, 2010). The government offered no evidence that Ms. Rodriguez was involved in (or was even aware of) a scheme to prepare and submit false returns prior to May 2007. To the contrary, the investigator admitted that Mr. Davila and Ms. Rodriguez apparently did not even meet until at least July 2006—18 months after their conspiracy supposedly began. *Id.* at 31-32.

The government soon presented a plea offer to Mr. Davila's counsel, which counsel attempted to discuss with Mr. Davila in jail. Mr. Davila, who suf-

fers from schizoaffective disorder, told counsel "in no uncertain terms that he was not capable of reviewing [the plea offer] or comprehending any explanation of it at that time." Docket Entry 35, at 2 (Aug. 21, 2009). Following this exchange, counsel asked the court to order a competency evaluation. *Id.* at 3.

The district court granted counsel's request, and Mr. Davila was sent to a federal medical facility in Texas, where he remained for nearly two months. In January 2010, the district court received a written report from the facility detailing Mr. Davila's condition. Mr. Davila, the report noted, "showed a sufficient rational understanding of the legal proceedings" and expressed a strong desire to exercise his trial rights:

> Although Mr. Davila was aware of the concept of a plea agreement, he was somewhat insistent that he would not consider a plea offer "because I didn't do this and I want my day in court." Mr. Davila reported that, at the present time, he wants to "fight my charges in court with a jury trial. That is my right, even if my attorney does not feel that is the best option." Mr. Davila presented as somewhat irritable and stubborn when discussing his legal case and charges.... He showed no influence of psychosis and/or self-defeating motivation as it related to his decision-making, other than his insistence on wanting to "fight my case and make them prove I did it."

Docket Entry 38, at 8-9 (Jan. 11, 2010); *see also* Docket Entry 128, at 8-9 (filed Jan. 18, 2011) (competency hearing transcript) (noting that Mr. Davila had "adamantly stated not only his right to have a jury determine the issues of guilt or innocence but his absolute desire to submit the case to the jury for determination").

The magistrate judge scheduled Mr. Davila's competency hearing for late February. Meanwhile, on January 27, 2010, Mr. Davila sent a handwritten letter to the district court requesting substitution of his appointed counsel. Among other things, Mr. Davila complained that his counsel, who was primarily a civil lawyer, was not qualified to handle a federal criminal trial, had not been adequately consulting with him, had failed to investigate the government's star witness (the unindicted co-conspirator), and had never discussed possible defenses with him. C.A. E.R. Ex. B, at 1. In Mr. Davila's words, counsel "has never mentioned a defense at all. The only defense he has expressed to me is to plead guilty[.]" *Id.* at 1-2.

In response to the letter, the magistrate judge convened an in camera hearing with Mr. Davila and his appointed counsel on February 8, 2010. From the start, the judge made clear that he had no intention of appointing new counsel. *See* J.A. 148 ("[H]e is the only court appointed attorney you are going to get. Make sure you understand that."). According to the judge, Mr. Davila's complaints rang especially hollow because his attorney "was my law clerk for a year, and he was one of the finest law clerks I ever had." J.A. 148.

Turning to the specifics of Mr. Davila's letter, the judge addressed "the fact that [counsel] thinks you ought to plead guilty." J.A. 152. This is often good advice, the court noted, and suggested that it was so here:

> In view of whatever the Government's evidence in a case might be, it might be a good idea for the Defendant to accept responsibility for his criminal conduct to plead guilty and go to sentencing with the best arguments on your behalf still available for not wasting the Court's time, not causing the Government to have to spend a bunch of money empanelling a jury to try an open and shut case.

Id.

Mr. Davila responded that counsel had pressed him to "sign an agreement without giving me my options" and did not once "talk about a viable defense at all except for pleading guilty." J.A. 154-55. The judge replied by telling Mr. Davila that "there may not be a viable defense to these charges." J.A. 155.

The judge then reiterated that he would not appoint new counsel and "strongly advise[d] [Mr. Davila to] make up with Mr. Loebl and recognize the fact that he is a very fine attorney." J.A. 158. The judge went on to urge Mr. Davila to stop resisting and to take a plea:

> [T]ry to understand, the Government, they have all of the marbles in this situation.... The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance.

J.A. 159-60.

Noting that Mr. Davila's guidelines range would "probably [be] pretty bad because your criminal history score would be so high," the judge advised that, beyond reducing his sentencing exposure by accepting responsibility, Mr. Davila should attempt to find "some way" to "cooperate with the Government" so that they might move for downward departure from the guidelines. J.A. 160. The judge told Mr. Davila that, to get the acceptance-of-responsibility and cooperation benefits, he would have to be "forthcoming and not try[] to make yourself look like you really didn't know what was going on." J.A. 160.

The judge concluded by again urging Mr. Davila "to come to the cross":

> You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction.

J.A. 160-61.

Several weeks later, the magistrate judge conducted a competency hearing and issued a report and recommendation finding Mr. Davila competent to stand trial. Docket Entry 44 (Mar. 4, 2010). The district court adopted the report and recommendation in late March. Docket Entry 52 (Mar. 23, 2010).

Immediately thereafter, plea negotiations became active, and Mr. Davila signed an agreement on May 11, 2010. In exchange for his plea of guilty to the conspiracy count, the government agreed to dismiss the remaining counts. The government also agreed not to object to a recommendation from the probation office for a two-level reduction for acceptance of responsibility and to move for an additional one-point reduction if Mr. Davila met certain conditions. *See* J.A. 127-28.

The district court convened a change-of-plea hearing on May 17. At the hearing, Mr. Davila insisted that the indictment overstated the scope of the

conspiracy. *See, e.g.*, J.A. 96 ("[A]ny conspiracy with Jennifer Rodriguez did not start until after July of 2006."). But he ultimately agreed that his conduct satisfied the elements of the offense. J.A. 99. To determine whether there was indeed a factual basis for the plea, the court heard testimony from a government investigator, who confirmed that, as far as he knew, Mr. Davila and Ms. Rodriguez did not meet until July 2006. The investigator acknowledged that the government had not "spoken to anyone directly who has information concerning a filing of fraudulent tax returns prior to July of '06." J.A. 110. The district court nevertheless accepted Mr. Davila's plea to the conspiracy as charged—a three-year, two-state conspiracy involving more than 120 tax returns and more than $423,000 in losses. J.A. 123.

Prior to sentencing, Mr. Davila filed a motion seeking to terminate his appointed counsel and proceed pro se. He cited "a breakdown in ... communication" and a breach of "attorney/client loyalty." Docket Entries 67, at 1 (July 27, 2010), 70, at 2 (Aug. 4, 2010). Specifically, he complained that counsel had acted improperly by advising him to plead guilty to the charged conspiracy and that counsel was now refusing to take steps to clarify to the court that any conspiracy was much narrower than the government alleged. The magistrate judge ultimately agreed to allow Mr. Davila to represent himself, with his appointed counsel serving as stand-by counsel. Docket Entry 77 (Sept. 14, 2010).

A day after the magistrate judge granted Mr. Davila's motion to terminate counsel, Mr. Davila moved to vacate his plea. Mr. Davila again faulted

the government for knowingly overstating the scope of the charged conspiracy and faulted his attorney for encouraging him to proceed with the plea. Docket Entries 79 (Sept. 15, 2010), 87 (Oct. 26, 2010).

The district court quickly disposed of Mr. Davila's motion at the start of his sentencing proceeding. Mr. Davila, the court concluded, had voluntarily entered into the plea agreement and had admitted that "any facts stated in the plea agreement were true and correct." J.A. 71.

The court proceeded to reject Mr. Davila's objections to the presentence investigation report. The report had calculated a total offense level of 23, which included a 14-point enhancement based on the report's conclusion that the losses at issue exceeded $400,000. J.A. 74, 76. The result was a guidelines range of 92 to 115 months' imprisonment. J.A. 74. The court sentenced Mr. Davila at the top of that range and ordered restitution of $423,530.63. J.A. 77.

Mr. Davila promptly filed a pro se notice of appeal. Docket Entry 96 (Nov. 15, 2010). The Court of Appeals assigned his trial counsel—the same attorney Mr. Davila had previously terminated—to represent him. Docket Entry 100 (Nov. 30, 2010). Mr. Davila asked both the district court and the Court of Appeals for new "conflict-free" counsel and filed papers criticizing his attorney for advising him to accept the plea without fully informing him of its consequences. Docket Entries 96 (Nov. 15, 2010), 116 (Dec. 17, 2010); 10-15310 Docket Entry (11th

Cir. Jan. 28, 2011). The courts denied those requests.

Mr. Davila's counsel then filed a brief stating that Mr. Davila had no nonfrivolous basis to appeal and sought to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals denied counsel's *Anders* motion. During its "independent review" of the record, the court found "an irregularity in the statements of a magistrate judge, made during a hearing prior to Davila's plea, which appeared to urge Davila to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences." Pet. App. 7a. Counsel, the court observed, had not discussed "whether this irregularity constituted an issue of arguable merit or express[ed] an opinion as to whether judicial participation [in plea discussions] occurred." *Id.* The court instructed counsel to file either "a merits brief that challenges the magistrate's pre-plea statements under Rule 11(c)(1)" or a new *Anders* brief addressing the issue. Pet. App. 8a.

Mr. Davila's counsel proceeded to file a brief asking the Court of Appeals to vacate Mr. Davila's conviction on the ground that the magistrate judge had violated Rule 11(c)(1)'s judicial participation prohibition. 10-15310 Docket Entry (11th Cir. Aug. 19, 2011). In response, the government conceded that the magistrate judge's comments "amounted to error, and the error was plain." 10-15130 Docket Entry at 14 (11th Cir. Sept. 29, 2011). The government, however, urged the Court of Appeals to deny relief on the ground that "Davila cannot demonstrate that the comments had any effect on his substantial rights,

that is, that there is a reasonable probability that Davila would not have pled guilty had the magistrate judge refrained from making the troublesome comments." *Id.* at 11.

The Court of Appeals ruled in Mr. Davila's favor. Reviewing for plain error, the court "agree[d] with Davila that the magistrate judge's comments at the *in camera* hearing amounted to judicial participation in plea discussions." Pet. App. 5a. Judicial participation, the court noted, "'inevitably carries with it the high and unacceptable risk of coercing a defendant to ... plead guilty'" and threatens "'the integrity of the judicial process.'" Pet. App. 3a-4a (quoting *United States v. Johnson*, 89 F.3d 778, 782-83 (11th Cir. 1996)). Accordingly, the fact that Mr. Davila "pled guilty after these comments were made" sufficed to warrant relief without any further showing of "individualized prejudice." Pet. App. 5a. The court "vacate[d] Davila's conviction and remand[ed] ... with the instruction that Davila's not guilty plea be reinstated and that the Chief Judge of the District Court reassign the case to another district judge with the instruction that the magistrate judge who handled Davila's case is disqualified." *Id.*

SUMMARY OF ARGUMENT

I. Federal judges "must not participate in [plea] discussions." Fed. R. Crim. P. 11(c)(1). This case involves an undisputed and egregious violation of that categorical prohibition: a judge urging a criminal defendant to forgo his trial rights and admit his guilt. When a defendant pleads guilty in the wake of such a violation, it is inappropriate for a

reviewing court to speculate about whether the defendant might have made the same decision in the absence of the judge's improper intervention. It must treat the plea as invalid and allow the defendant to plead anew.

A. The ban on judicial participation in plea discussions announced in Rule 11(c)(1) differs in kind from the technical plea-colloquy procedures set forth elsewhere in Rule 11, which come into play *after* a defendant decides to proffer a guilty plea. A variance from those colloquy requirements does not inherently impair the process that led to the plea. This Court confronted such variances in *United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004)—the two precedents on which the government most heavily relies. The judicial participation prohibition, in contrast, speaks to the period *before* any plea has been proffered and reflects a judgment that such participation, especially when it comes in the form of blatant judicial pressure to plead guilty, is fundamentally incompatible with a fair criminal process. A judge who violates the ban alters the entire pretrial dynamic. For the defendant, the judge becomes an additional adversary rather than the ultimate guarantor of the defendant's rights and guardian of the presumption of innocence. For the defendant's attorney, the judge's intervention creates serious pressure to secure a deal. Because judicial intervention inevitably prevents the adversary system from functioning as it should, any guilty plea that follows is tainted and is properly deemed invalid.

B. A reviewing court cannot save a plea obtained after a plain Rule 11(c)(1) violation by conducting a speculative inquiry into whether the defendant might have entered the same plea absent the judge's misconduct. Rule 11(h) does not call for such analysis. By its terms, the Rule applies only to "variance[s]" from the "procedures required" by Rule 11. Rule 11(c)(1) is a clear prohibition. It is not properly characterized as a required "procedure[]," and violations of the Rule are not "variance[s]." This language is instead meant to describe the type of plea-colloquy errors at issue in *Vonn* and *Dominguez Benitez*. The Advisory Committee notes accompanying Rule 11(h) lend strong support to this view. They recognize that certain types of Rule 11 errors can never be dismissed as harmless. The chief example the Advisory Committee offered is the error a judge commits by allowing a prosecutor to conduct the Rule 11 plea colloquy. If that error requires reversal, the same is necessarily true of the more egregious error that occurs when a judge exhorts a defendant to plead guilty.

C. Even if subdivision (h) applied, the characteristics of plain Rule 11(c)(1) violations confirm that they should not be subject to the sort of individualized prejudice inquiry the government advocates. All of the factors this Court has considered when deciding whether to require a specific showing of prejudice counsel in favor of holding that judicial exhortations to plead guilty affect substantial rights by their very nature:

First, when judges participate in plea discussions and press for guilty pleas, they threaten

a defendant's fundamental rights by, among other things, interfering with the jury trial guarantee and the privilege against self-incrimination. They also gravely compromise the neutrality of the court.

Second, the coercive pressure inherent in judicial advocacy of guilty pleas makes it virtually certain that such errors will influence the course of the proceedings. The government suggests that judicial involvement in the plea process will sometimes be inconsequential, but its examples likely do not amount to judicial participation within the meaning of Rule 11(c)(1), and they certainly do not come within the core category of conduct the Rule condemns—direct judicial exhortations to plead guilty. That is the class of conduct at issue in this case.

Third, any inquiry into whether the defendant would have entered the same plea had the judge not altered the dynamic of the plea process is hopelessly speculative. Defendants are not required to apply any set criteria to their plea decisions, and the record generally will provide no more than a glimpse into their thought processes and into the details of the parties' negotiations.

Finally, the type of defendant-specific prejudice inquiry the government advocates will have practical costs. To the extent defendants aggrieved by judicial exhortation errors do not obtain relief on direct appeal, they will simply seek collateral review, and the nature of their claims will often necessitate substantial proceedings.

D. Because Rule 11(c)(1) errors categorically differ from plea-colloquy errors, it would be inappropriate to import into this context the remedial analysis this Court adopted in *Vonn* and *Dominguez Benitez*. Where, as in this case, an error alters the structure of the plea negotiation process and injects an element of coercion, stronger remedial medicine is required.

II. Even under the government's preferred approach to prejudice, this Court should affirm the judgment in Mr. Davila's favor.

A. Contrary to the government's assumption, review of Mr. Davila's claim should not occur in a plain-error framework, and the government should therefore have the burden of proving the absence of prejudice. It would have been unrealistic in the circumstances of this case to expect a contemporaneous objection to the magistrate judge's misconduct, and it would be unfair to penalize Mr. Davila for the lack of objection. Mr. Davila's attorney had no incentive to object given that the magistrate judge was sending exactly the message counsel wanted Mr. Davila to hear. Meanwhile, Mr. Davila himself had no obligation to object because he was represented, if only nominally.

B. Regardless, wherever the burden lies, the magistrate judge's misconduct was patently prejudicial. There can be no real doubt that Mr. Davila, who was long adamant about his desire to take his case to trial, was influenced by the judge's exhortations when he decided to pursue a plea deal. The record offers no alternative explanation for his

change of heart. The fact that it took some time for the plea deal to be negotiated and finalized in no way detracts from the powerful inference that the magistrate judge helped get Mr. Davila to the bargaining table. Similarly, it is irrelevant that a different judge later presided over the change-of-plea hearing. The offending remarks almost certainly affected Mr. Davila's decision to proffer the plea, and the district court did nothing to disavow them. Mr. Davila should have an opportunity to replead.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY GRANTED RELIEF TO MR. DAVILA WITHOUT REQUIRING A SPECIFIC SHOWING OF PREJUDICE

A. Judicial Exhortations To Plead Guilty Subvert The Criminal Process In Ways That Other Rule 11 Violations Do Not

Federal Rule of Criminal Procedure 11(c)(1) categorically directs that federal judges "must not participate in [plea] discussions." That flat prohibition on judicial participation pertains primarily to the period *before* a defendant proffers a guilty plea and embodies a basic judgment about how plea negotiations should operate. Most of Rule 11's other provisions, in contrast, merely describe what courts are required to do *after* a plea is proffered. Contrary to the government's assertions, the remedial analysis that applies to violations of those procedural provisions does not and should not apply to the distinct class of error at issue in this case.

1. Variances From Rule 11's Plea-Acceptance Procedures Do Not Inherently Taint Pleas

Rule 11 sets forth detailed procedures a district court must follow after a defendant informs the court of his decision to enter a guilty plea. These procedures help the court make "the constitutionally required determination that [the] plea is truly voluntary." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). For example, because voluntariness "cannot [be] presume[d] ... from a silent record," *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), the Rule instructs courts to "address the defendant personally in open court" and inform him in detail about his rights and the consequences of his plea; to confirm that the defendant's plea "did not result from force, threats, or promises (other than promises in a plea agreement)"; and to establish that the plea has a factual basis. Fed. R. Crim. P. 11(b). The Rule also seeks to bring plea bargaining, which was formerly a "clandestine practice" of questionable legality, out of the shadows. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978). It requires the prosecution and the defendant to "disclose [any] plea agreement in open court" so that the court may review it and assess its propriety. Fed. R. Crim. P. 11(c)(2).

It was a variance from these required procedures that this Court confronted in the two cases on which the government most heavily relies—*United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). The defendants there had expressed their desire to plead guilty, and, during the course of the Rule 11 plea-review

hearing, the district court neglected to tell them something they likely already knew. The judge in *Vonn* forgot to advise the defendant that he would continue to have the right to the assistance of counsel if he went to trial. 535 U.S. at 60. The judge in *Dominguez Benitez* failed to mention that the defendant would not have the opportunity to withdraw his plea if the court rejected the government's sentencing recommendations. 542 U.S. at 78. While such variances may hinder the district court's ability to double-check that the defendant is aware of the specific consequences of his guilty plea, they do not directly call into question the legitimacy of the plea itself.

2. In Contrast, Judicial Exhortation Errors Corrupt The Very Process By Which Plea Decisions Are Made

The Rule's categorical ban on judicial participation serves a different purpose. It is not primarily intended to help the court scrutinize a defendant's proffered plea. Instead, it serves to prevent the court itself from corrupting the plea process by pressing defendants to admit their guilt and forgo their trial rights. This is a much more foundational protection—one central to the proper functioning of the criminal process.

The American system of criminal justice requires judges to be plea skeptics, not plea proponents. "A plea of guilty," after all, "is more than a confession which admits that the accused did various acts; it is itself a conviction." *Boykin*, 395 U.S. at 242. By entering a guilty plea, a defendant waives a host of

constitutional rights, including "the privilege against compulsory self-incrimination," "the right to trial by jury," and "the right to confront one's accusers." *Id.* at 243. The plea is not constitutionally valid unless the defendant's waiver of these rights is "voluntary and knowing." *McCarthy*, 394 U.S. at 466; *see also United States v. Jackson*, 390 U.S. 570, 581 n.20 (1968) ("due process forbids convicting a defendant on the basis of a coerced guilty plea"); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

While defendants are certainly free to admit their guilt, and often find it advantageous to do so, judges must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks omitted). Their role is to ensure that defendants fully understand the protections the Constitution affords to those accused of crimes and to make certain that no defendant gives up those protections because he feels forced to do so. As this Court has put it, "[w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable." *Boykin*, 395 U.S. at 243-44; *see also Patton v. United States*, 281 U.S. 276, 312-13 (1930) (directing courts to scrutinize carefully a defendant's request to be tried by a judge rather than a jury).

In short, the legitimacy of plea bargaining and of plea bargains "[p]resupposes fairness in securing agreement between an accused and a prosecutor," *Santobello v. New York*, 404 U.S. 257, 261 (1971),

which in turn presupposes that the adversary system is operating as it should, with partisan advocacy on both sides and the judge assuring fair play and safeguarding the defendant's rights. When courts urge defendants to plead guilty, they contribute to a "breakdown in the adversary process that our system counts on to produce just results." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). It is difficult for judges to be "fair and neutral arbiter[s]"—and even more difficult for them to be viewed as such—when they cast themselves in what is essentially a prosecutorial role. *United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006); *see also United States v. O'Neill*, 437 F.3d 654, 660 (7th Cir. 2006) (Posner, J., concurring in the result) ("Judges in our system do not double as prosecutors.").

The vulnerable position in which criminal defendants find themselves makes judicial advocacy of guilty pleas especially troubling. The distressing experience of being arrested, brought before a judge, and charged with crimes threatening lengthy imprisonment can intimidate even the most unflappable defendants. With their liberty at stake and the full force of the government's prosecutorial apparatus lined up against them, their only solace is the rights afforded by the Constitution and criminal rules—rights meant to provide a vital counterweight. When defendants perceive the court to be working hand-in-hand with the prosecution, they lose faith that the system will indeed presume them innocent, honor their rights, and hold the government to its heavy burden of proof. In their eyes, the court becomes "an adversary rather than ... the embodiment of [the] guarantee of a fair trial and just

sentence." *Bradley*, 455 F.3d at 461 (alteration and internal quotation marks omitted). A defendant who is led to believe that his trial right is illusory and that a guilty plea is his only real option cannot be said to have made a "voluntary and intelligent choice among the alternative courses of action open to [him]." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

Judicial intervention in the plea process, moreover, can leave as indelible an impression on defense counsel as on the defendant himself. While counsel is supposed to "play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the [defendant's] claim[s]," *Evitts v. Lucey*, 469 U.S. 387, 394 (1985), counsel will no doubt be reluctant to go against the court's expressed wishes and will feel pressure to deliver a deal. The defendant may, for all practical purposes, find himself facing three prosecutors—the government, the court, and his own attorney—with no one truly acting on his behalf to assure "a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. A pretrial system that has been distorted in this way simply cannot produce valid pleas.

Rule 11(c)(1)'s bright-line prohibition on judicial exhortations to plead guilty is thus no mere procedural technicality. It reflects an important judgment that judicial interference with a defendant's plea calculus imperils the basic fairness of the criminal process. Even before the enactment of the 1975 version of Rule 11, which addressed plea bargaining and judicial participation for the first time, courts and commentators widely condemned the sort of judicial

advocacy that occurred in this case.[1] As one of the most cited analyses of the issue put it, "[t]he unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office." *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966). The Advisory Committee that drafted the judicial participation prohibition quoted this passage in its commentary and observed that the pressure a defendant inevitably feels to "go[] along with the

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[1] *See, e.g., Scott v. United States*, 419 F.2d 264, 273-74 (D.C. Cir. 1969) (discussing the "compelling" reasons "for demanding that the judge not become a participant in the bargaining process"); *Brown v. Beto*, 377 F.2d 950, 957 (5th Cir. 1967); *Worcester v. Comm'r*, 370 F.2d 713, 718 (1st Cir. 1966); *Euziere v. United States*, 249 F.2d 293, 295 (10th Cir. 1957); *People v. Clark*, 515 P.2d 1242, 1242-43 (Colo. 1973) (finding it "fundamentally unfair" for a judge to "use[] the power of his position in an attempt to force the defendant to plead guilty"); *State v. Poli*, 271 A.2d 447, 450 (N.J. 1970); *State v. Wolfe*, 175 N.W.2d 216, 221 (Wis. 1970); *Commonwealth v. Evans*, 252 A.2d 689, 690-91 (Pa. 1969); *Weaver v. State*, 207 So. 2d 134, 136 (Ala. 1968); *State v. Benfield*, 140 S.E.2d 706, 707-08 (N.C. 1965); *Letters v. Commonwealth*, 193 N.E.2d 578, 580-81 (Mass. 1963); Recent Developments, *Judicial Plea Bargaining*, 19 Stan. L. Rev. 1082, 1089 (1967) (describing judicial advocacy of pleas as a "threat to judicial impartiality" that runs counter to the notion that the judge "should not be an advocate, but rather a symbol of even-handed justice").

When this Court approved the practice of prosecutorial bargaining, it was careful to clarify that it was not dealing with a situation in which the judge sought "to induce a particular defendant to tender a plea of guilty." *Brady v. United States*, 397 U.S. 742, 751 n.8 (1970).

disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent." Rule 11 advisory committee's note (1974).

Since the adoption of Rule 11(c)(1), the consensus has only deepened that judicial exhortations to plead guilty are beyond the pale. While some states allow limited judicial involvement in the plea negotiation process, they denounce with virtual unanimity the practice of pushing defendants into guilty pleas.[2] The ABA Standards for Criminal Justice reflect the prevailing view: "The judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." ABA Standards for Criminal Justice: Pleas of Guilty § 14-3.3(c) (3d ed. 1999); *see also id.* § 14-3.3(d) ("A judge should not ordinarily participate in plea negotiation discussions among the parties."). "This standard is im-

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[2] *See, e.g., State v. Vandehoven*, 772 N.W.2d 603, 607-09 (N.D. 2009); *State v. Oliver*, 186 P.3d 1220, 1225-26 (Kan. Ct. App. 2008); *State v. Anyanwu*, 681 N.W.2d 411, 414 (Minn. Ct. App. 2004); *People v. Weaver*, 118 Cal. App. 4th 131, 146-50 (2004); *State v. Bouie*, 817 So. 2d 48, 55 (La. 2002); *State v. Sanders*, 549 S.E.2d 40, 55-56 (W. Va. 2001); *McDaniel v. State*, 522 S.E.2d 648, 649-50 (Ga. 1999); *People v. Cobbs*, 505 N.W.2d 208, 211-12 (Mich. 1993); *In re Fisher*, 594 A.2d 889, 893-94 (Vt. 1991); *In re Cox*, 553 A.2d 1255, 1256-58 (Me. 1989); *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 9 (Tex. Crim. App. 1983); *State v. Jordan*, 672 P.2d 169, 173-74 (Ariz. 1983); *State v. Byrd*, 407 N.E.2d 1384, 1387-89 (Ohio 1980); *State v. Svoboda*, 287 N.W.2d 41, 44-45 (Neb. 1980); *Fermo v. State*, 370 So. 2d 930, 933 (Miss. 1979); *State v. Cross*, 240 S.E.2d 514, 516 (S.C. 1977); *State v. Buckalew*, 561 P.2d 289, 291 (Alaska 1977); *Anderson v. State*, 335 N.E.2d 225, 227-28 (Ind. 1975).

portant," the ABA commentary explains, "because it protects the constitutional presumption of innocence, and avoids placing judicial pressure on the defendant to compromise his or her rights.... [D]irect judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed." *Id.* § 14-3.3(c)-(d) cmt.

B. Properly Understood, Rule 11(h) Accepts That Judicial Exhortation Errors Are, By Their Nature, Not Harmless

Because judicial advocacy of guilty pleas distorts the process our system counts on to produce fair pleas, a plea entered in the wake of such conduct is inherently tainted. Contrary to the government's repeated assertions, Rule 11(h) does not entitle courts to save such pleas by conducting a speculative inquiry into what might have happened absent the improper intervention. Before subdivision (h) was added to the Rule in 1983, it was the norm for courts to remedy judicial exhortation errors without a defendant-specific prejudice inquiry. *See, e.g.*, *United States v. Adams*, 634 F.2d 830, 839 (5th Cir. Unit A Jan. 1981). Nothing in subdivision (h) requires courts to change course. By its terms, Rule 11(h) simply does not apply to the type of error at issue here. And even if the provision did apply, a blatant violation of Rule 11(c)(1) is exactly the sort of error that the drafters of Rule 11(h) said would *not* be harmless.

The text of Rule 11(h) makes clear that its function is to enable courts to uphold guilty pleas notwithstanding a minor plea-colloquy defect of the type

at issue in *Vonn* and *Dominguez Benitez*. As originally enacted, Rule 11(h) declared: "Any *variance* from the *procedures required* by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P 11(h) (1983) (emphasis added).[3] While that language perfectly describes what happens when a court departs from the usual script during a Rule 11 hearing, it does not capture a violation of Rule 11(c)(1)'s categorical ban on judicial participation in plea discussions.

In normal parlance, a prohibition, such as the one set out in Rule 11(c)(1), is not a "required procedure," and the breach of a prohibition is not a "variance." *Cf.* Black's Law Dictionary 1323 (9th ed. 2009) (defining "procedure" as "[a] specific method or course of action"); *id.* at 1692 (defining "variance" as "[a] difference or disparity between two statements or documents that ought to agree"). Had the drafters meant for subdivision (h) to apply to every type of Rule 11 error and not just to variances from the Rule's detailed plea-acceptance procedures, they easily could have said that "all violations of Rule 11 shall be reviewed for harmlessness," or they could have drawn broader language from elsewhere in the Rules. *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). Their choice of narrower language is strong evidence that they

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[3] As amended, Rule 11(h) now states: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." As the government notes, Gov't Br. 12-13, this amendment was "intended to be stylistic only." Rule 11 advisory committee's note (2002).

did not intend subdivision (h) to sweep as broadly as the government suggests. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (the absence of language in one provision that appears in other provisions is "generally presumed" to reflect a deliberate legislative judgment).

The history of Rule 11 and the Advisory Committee notes to subdivision (h) confirm that Rule 11(h) does not apply to judicial exhortation errors and that those errors cannot be deemed harmless. This Court has described the Advisory Committee notes as "a reliable source of insight into the meaning of" the Rule. *Vonn*, 535 U.S. at 64 n.6; *see also* Gov't Br. 12.

Rule 11(h) came in response to a series of appellate court decisions that had held that even slight deviations from Rule 11's plea-colloquy procedures required a conviction to be reversed. Those decisions purported to apply *McCarthy v. United States*, 394 U.S. 459 (1969), in which this Court addressed a defendant's claim that the district court had violated Rule 11 by accepting the defendant's guilty plea without first personally addressing the defendant to ensure that he understood the nature of the charge to which he was pleading. This Court unanimously ruled in the defendant's favor, holding that "a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." *Id.* at 463-64. The Court did not make this relief contingent on a specific finding of prejudice.

The Court decided *McCarthy* at a time when Rule 11 was "very brief." Rule 11 advisory commit-

tee's note (1983). In 1975, amendments were adopted that "increased significantly the procedures [courts must] undertake[] when a defendant tenders a plea of guilty." *Id.* As a result, it became more likely that "a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require." *Id.*; *see also Vonn*, 535 U.S. at 70 (noting that the 1975 amendments "imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified"). The drafters of Rule 11(h) sought to clarify that "a minor and technical" departure from Rule 11's newly elaborated plea-colloquy procedures could be written off as harmless error. Rule 11 advisory committee's note (1983); *see also Vonn*, 535 U.S. at 70. At no point in its lengthy discussion did the Advisory Committee mention the Rule's ban on judicial participation or suggest that Rule 11(h) provided a device for treating clear violations of Rule 11(c)(1) as harmless.

Even if the text of Rule 11(h) could be read to encompass Rule 11(c)(1) violations, that still would not make the mode of prejudice analysis that applies to plea-colloquy errors applicable to judicial exhortation errors. The text of subdivision (h) merely says a variance from the rule's requirements "is harmless error if it does not affect substantial rights." Fed. R. Crim. P. 11(h). Given that judicial exhortation errors differ substantially from plea-colloquy errors, it is entirely reasonable that the proper technique for deciding whether each class of error "affect[s] substantial rights" would differ as well. Indeed, having criticized those courts that had "felt bound to treat all Rule 11 lapses as equal and to read *McCarthy* as

mandating automatic reversal for any one of them," *Vonn*, 535 U.S. at 70, the Advisory Committee presumably did not mean to go to the opposite extreme and make all Rule 11 lapses equally subject to the defendant-specific harmlessness inquiry the government advocates.

The Advisory Committee notes lend strong support to the view that judicial exhortation errors are not subject to the same remedial analysis as plea-colloquy errors. First, while the Advisory Committee criticized "expansive reading[s]" of *McCarthy*, *Vonn*, 535 U.S. at 66, it never suggested that *McCarthy* itself had been wrongly decided or was at odds with "the harmless error rule of Rule 52(a)." Rule 11 advisory committee's note (1983). To the contrary, the Advisory Committee accepted that "the *McCarthy* per se rule may have been justified at the time" when Rule 11 "required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight." *Id.*; *see also Vonn*, 535 U.S. at 69 (noting that subdivision (h) was precipitated not "by *McCarthy* so much as by events that subsequently invested that case with a significance beyond its holding"). Thus, while subdivision (h) marked a retreat from the blanket policy of automatic reversal for *all* Rule 11 errors, Rule 11(h) did not create a per se rule against per se rules.

Second, the Advisory Committee used an "important cautionary note[]" to "emphasize" that some categories of Rule 11 error would remain automatically reversible. Rule 11 advisory committee's note (1983). "[S]ubdivision (h)," the Advisory Committee wrote, "should *not* be read as supporting extreme or

speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards." *Id.* It offered the following example: "[I]t would *not* be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this 'results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11.'" *Id.* (quoting *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976) (per curiam)). The Committee continued: "Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited." *Id.*

If the exemplar of the "kind[] of Rule 11 violation[]" that "would *not* be harmless" is a case in which the court blurs the judicial-prosecutorial line by delegating plea-colloquy duties to the prosecutor, then surely a case in which the court blurs the line by exhorting a defendant to plead guilty falls into the same category. The Advisory Committee's express approval of the Fifth Circuit's decision in *Crook* to remedy a prosecutorial participation error without insisting on a specific showing of prejudice necessarily implies approval for that court's nearly contemporaneous decision in *Adams* to take the same approach to judicial participation errors. *See* 634 F.2d at 839. By virtually any measure, a judge who presses a defendant to plead guilty taints the proceedings far more palpably than one who merely allows the prosecutor to conduct the Rule 11 colloquy after a plea deal has been reached. While the coercion in the latter case is "subtle," in the former it is anything but. In both scenarios, there is no point

speculating about what might have happened had everyone played their proper role. The process has been corrupted, and a new opportunity to plead is required.

C. The Characteristics Of Judicial Exhortation Errors Confirm That An Individualized Prejudice Inquiry Is Inappropriate

This Court need not look beyond the text, clear purpose, and above-discussed history of Rule 11 to conclude that the Court of Appeals properly rejected the government's call for a counterfactual inquiry into how the plea process would have played out had the magistrate judge not pressed Mr. Davila to forgo a trial and strike a plea deal. The drafters would have expected the court to do exactly what this Court did in *McCarthy*: allow Mr. Davila to "plead anew." 394 U.S. at 472. A broader analysis of the characteristics of judicial exhortation errors bolsters this conclusion.

While a record-intensive inquiry into an error's influence on the outcome of a particular proceeding is often the right way to decide whether the error is worth correcting, this Court has found such a requirement to be unnecessary and inappropriate in numerous contexts. Some types of errors, this Court has recognized, should be said to "affect substantial rights" by their very nature. Fed. R. Crim. P. 52. Judicial exhortation errors have attributes that place them in this class.

Errors that have been held to qualify for correction without a specific showing of prejudice come under several headings. There are so-called "structural defects," which "affect[] the framework" of judicial proceedings and "defy" individualized prejudice analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).[4] There are also errors this Court has variously described as "inherently," "per se," or "presumptively" prejudicial.[5] There are, in addition, instances in which this Court has simply rejected the

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[4] *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (denial of counsel of choice); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (improperly constituted grand jury); *Waller v. Georgia*, 467 U.S. 39, 49, n.9 (1984) (denial of public trial guarantee). "At the other end of the spectrum" from errors such as these are "trial error[s]," *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993), which "occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence ... to determine whether [their] admission was harmless," *Fulminante*, 499 U.S. at 307-08. The error at issue in this case plainly does not fit the "trial error" mold since there has been no trial.

[5] *See, e.g., Carey v. Musladin*, 549 U.S. 70, 72 (2008) ("certain courtroom practices," such as requiring a defendant to appear in prison clothes, are "inherently prejudicial"); *Smith v. Massachusetts*, 543 U.S. 462, 473 n.7 (2005) ("Requiring some[one] to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause."); *United States v. Olano*, 507 U.S. 725, 739 (1993) ("There may be cases where an intrusion should be presumed prejudicial."); *Strickland*, 466 U.S. at 692 ("maintain[ing] a fairly rigid rule of presumed prejudice for [attorney] conflicts of interest").

government's call for case-specific prejudice analysis without pausing to give the error a label.[6]

Looking specifically to the plea context, this Court has identified several errors that warrant relief without a case-specific prejudice analysis. Reversal is required, for instance, when a judge accepts a guilty plea without making any inquiry into whether the defendant was voluntarily waiving his trial rights. *See Boykin*, 395 U.S. at 243-44; *see also Dominguez Benitez*, 542 U.S. at 84 n.10 (indicating that "such a conviction could [not] be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless"). Similarly, a conviction cannot stand where the defendant "neither personally waived his right [to stand trial] nor acquiesced in his lawyer's attempted waiver." *Brookhart v. Janis*, 384 U.S. 1, 8 (1966). And, in *McCarthy*, this Court held that "prejudice inhere[d]" in violations of the 1966 version of Rule 11. 394 U.S. at 471.[7]

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[6] *See, e.g., Nguyen v. United States*, 539 U.S. 69, 81 (2003) (vacating judgment "without assessing prejudice" where non-Article III judge sat on an appellate panel); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (reversing where district court improperly assigned magistrate judge to conduct *voir dire* even though "petitioners allege[d] no specific prejudice").

[7] This Court also has held that "the interests of justice" support granting relief when the government breaches a plea agreement by failing to make a promised sentencing recommendation even if it appears that the breach was harmless. *Santobello*, 404 U.S. at 262. In *Puckett v. United States*, the Court concluded that, when a case is in a plain-error posture due to the defendant's failure to object to such a breach, the interests of justice do not "relieve the defendant of

Several considerations animate this Court's decisions to dispense with a defendant-specific inquiry into how the error affected the proceedings. These considerations should guide the Court's analysis here. First, the Court has often noted the significance of the rights threatened by the error. *See, e.g., Neder v. United States*, 527 U.S. 1, 8-9 (1999). Of course, even errors that implicate fundamental rights may be susceptible to an individualized prejudice analysis, but the greater the interest at stake, the greater the need to avoid potentially underinclusive remedial rules. Second, the Court has examined the natural tendency of the error to affect the result. Some errors are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Third, the Court has asked whether the nature of the error is such that its precise impact often will be difficult to pinpoint in specific cases. *See, e.g., United States v.*

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his usual burden of showing prejudice." 556 U.S. 129, 141 (2009). The government's attempt to analogize this case to *Puckett* is unavailing. First, as this Court emphasized in that case, an after-the-fact breach of a plea agreement does not call into question the validity of the plea and closely resembles "other procedural errors at sentencing, which are routinely subject to harmlessness review." *Id.* at 137-38, 141. Judicial exhortation errors, in contrast, directly taint the plea itself and are not amenable to defendant-specific prejudice analysis. *Puckett* did not suggest that it was disavowing *Olano*'s acknowledgement that some errors may qualify for correction, as plain errors, without a particularized prejudice inquiry. *See Olano*, 507 U.S. at 735, 739. Second, as discussed *infra* at 51-53, plain-error review should not apply at all because Mr. Davila had no real opportunity to make a contemporaneous objection.

Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006) (basing "conclusion of structural error upon the difficulty of assessing the effect of the error"). Finally, the Court has evaluated practicalities, including how the decision to dispense with an individualized prejudice inquiry might serve or disserve judicial economy and society's interest in the finality of convictions. *Cf.* Fed. R. Crim. P. 2 (requiring courts to interpret the Federal Rules "to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay").

The Court has not distilled these considerations into a formal test or demanded that all of them point in the same direction. The factors it has chosen to emphasize vary from case to case. In this case, each factor strongly supports the Court of Appeals' conclusion that the judicial participation violation at issue here warrants a remedy without a showing of "individualized prejudice." Pet. App. 5a.

1. Judicial Exhortations To Plead Guilty Threaten Fundamental Rights

To reiterate, this case does not involve a "technical violation" of Rule 11 that "lack[s] constitutional dimension." *Cf.* Gov't Br. 21, 24. It involves a limited category of grievous judicial impropriety—a judge exhorting a defendant to plead guilty. Mr. Davila was told that "there may not be a viable defense" to the charges against him, that he should not "wast[e] the Court's time ... empanelling a jury to try" a supposedly "open and shut case," that the

prosecution had "all the marbles," that he "need[ed]" to admit everything and "not try[] to make [it] look like [he] really didn't know what was going on," and that he had "to come to cross" and "g[i]ve it all up." This is conduct no court has condoned. By pressuring defendants to admit their guilt and negotiate a deal, judges engage in exactly the sort of behavior they are supposed to prevent, and they "needlessly chill the exercise of" rights they are duty-bound to protect. *Jackson*, 390 U.S. at 582. Such conduct stands the criminal justice system on its head.

Judicial interference with the jury trial guarantee is particularly abhorrent. No matter how prevalent guilty pleas become, jury trials remain the constitutional default. The right to a jury trial exists precisely because "*the Constitution does not trust judges to make determinations of criminal guilt.*" *Neder*, 527 U.S. at 32 (Scalia, J., concurring in part and dissenting in part) (emphasis in original); *see also Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."). By imploring defendants not to exercise their trial rights, judges take cases out of the jury's hands just as surely as they do when they direct the jury to convict—something the Constitution categorically forbids. *See, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). At least with a directed verdict, the judge has heard all the evidence. In contrast, judges who prod defendants to plead guilty will, as in this case, often have only a superficial un-

derstanding of the applicable facts and law. The defendant who is told that there is no point in taking the case to the jury because conviction is a foregone conclusion understandably loses faith that the court will "assiduously work[] to impress jurors with the need to presume the defendant's innocence." *Holbrook v. Flynn*, 475 U.S. 560, 567-68 (1986); *see also Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.").

The affront to the privilege against self-incrimination is equally serious. In multiple contexts, this Court has long endeavored to protect individuals against coercive pressures that interfere with their ability to maintain their silence. There is, of course, the *Miranda* rule, which serves to counter the "'inherently compelling pressures' of custodial interrogation." *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010) (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). This Court has also restricted the ability of states to penalize defendants who invoke the right and refuse to incriminate themselves. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967) (a state may not impose the penalty of job forfeiture on those who remain silent because of "the coercion inherent" in that choice). And the Court has held that a trial court violates the right when it forces a defendant to testify either at the start of the defense case or not all. *See Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972). If the right against self-incrimination is impermissibly burdened (1) when the authorities seek to elicit statements without giv-

ing a *Miranda* warning, (2) when a state makes the exercise of the right more costly, and (3) when a court limits the defendant's testimonial options, then surely the same is true when a judge urges a defendant to admit his guilt.

Finally, when judges step into a prosecutorial role and become plea advocates, they deprive the defendant of the impartial adjudicator that due process guarantees. As this Court recognized long ago, "[a] situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial," necessarily calls the integrity of the proceedings into doubt. *Tumey v. Ohio*, 273 U.S. 510, 534 (1927); *see also Adams*, 634 F.2d at 839 (judicial advocacy of guilty pleas undermines "the vital neutrality of the trial judge"); *United States v. Werker*, 535 F.2d 198, 203 (2d Cir. 1976) ("Rule 11 implicitly recognizes that participation in the plea bargaining process depreciates the image of the trial judge that is necessary to public confidence in the impartial and objective administration of criminal justice."); *cf. Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (noting that "[t]he citizen's respect for judgments depends ... upon the issuing court's absolute probity"). A presumptively innocent defendant who hears a judge implore him to admit his guilt is as justifiably aggrieved as a defendant who appears before a judge whose "executive responsibilities for [local] finances" may give him an incentive to impose fines, *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), or a litigant who appears before a tribunal containing a member who received significant campaign support from someone affiliated with his ad-

versary, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884-86 (2009).

2. Judicial Exhortations To Plead Guilty Inherently Influence A Defendant's Plea Calculus

When an error is, by its nature, highly likely to exert an influence on the outcome of judicial proceedings, a "case-by-case inquiry into prejudice" may not be "worth the cost." *Strickland*, 466 U.S. at 692. The error a judge commits by urging a defendant to relinquish his trial rights and enter into a plea deal with the government falls squarely into this category. As one court has put it, "it is difficult to imagine a situation in which the court would find a judge's participation in the plea negotiation process to be harmless given the inherent pressure placed on the defendant." *United States v. Rodriguez*, 197 F.3d 156, 160 (5th Cir. 1999).

Because judges occupy a special position of authority, their intervention is difficult to ignore. Defendants and their attorneys will typically give great weight to the judge's pronouncements and will be reluctant to defy the expressed wishes of "one who wields such immediate power." *Werker*, 535 F.2d at 202. The recommendations of the judge will naturally "become[] the focal point of further discussions," *id.* at 203, and will "raise[] the possibility, if only in the defendant's mind, that a refusal to accept the judge's preferred disposition [will] be punished," *United States v. Barrett*, 982 F.2d 193, 194 (6th Cir. 1992); *see also United States v. Anderson*, 993 F.2d 1435, 1438-39 (9th Cir. 1993) (finding it "difficult to

imagine how [the defendant] could not have felt pressured" when the court made plea-related comments that "effectively threw the weight of the court behind the prosecution").

It is no wonder the Courts of Appeals uniformly describe a judge's exhortations to plead guilty as "inherently coercive." *E.g.*, *United States v. Cano-Varela*, 497 F.3d 1122, 1133-34 (10th Cir. 2007); *United States v. Baker*, 489 F.3d 366, 376 (D.C. Cir. 2007). Such involvement, they have repeatedly concluded, "inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty." *United States v. Bruce*, 976 F.2d 552, 556 (9th Cir. 1992); *see also Bradley*, 455 F.3d at 460; *United States v. Kraus*, 137 F.3d 447, 457 (7th Cir. 1998) ("Those pressures do not vary depending on the facts; they are inherent in judicial intervention.").

Thus, even those courts that purport to review judicial participation errors for harmlessness very rarely conclude that the error was not prejudicial. Some have even described "the possibility of harmless error" as "more theoretical than real." *Kraus*, 137 F.3d at 457; *see also United States v. Miles*, 10 F.3d 1135, 1141 (5th Cir. 1993) ("[T]he pressure inherent in judicial participation would seem to be reason enough to reverse a conviction when the defendant accedes to the plea suggested by the district court."). Indeed, no published appellate court decision appears ever to have let stand a guilty plea entered after a judge urged the defendant to forgo a trial and pursue a plea deal with the government. The reality is that judicial advocacy of a guilty plea

will virtually always factor into a defendant's decision-making process.[8]

The government posits that cases may arise in which "the judge's comments merely expressed what was already obvious to the negotiating parties, were entirely neutral, or even discouraged the defendant from pleading." Gov't Br. 22. But comments of that nature will not typically amount to "participat[ion]" in plea "discussions" under Rule 11(c)(1).[9] This case ultimately concerns the proper remedy for an undisputed core violation of the Rule—a judicial exhortation to plead guilty. That sort of judicial impropriety inherently influences a defendant.

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[8] The two cases the government identifies as examples of "nonprejudicial" judicial participation violations are not on point. *Cf.* Gov't Br. 24. In *United States v. Pagan-Ortega*, 372 F.3d 22 (1st Cir. 2004), the judge's comments were not made until *after* "the plea agreement had been reached"; the court "assume[d]" this was error. *Id.* at 25-27. Similarly, in *United States v. Ebel*, 299 F.3d 187 (3d Cir. 2002), the judge's comments came only after the defendant had stated his desire to enter into a particular plea and did not induce the defendant to do anything "beyond what he had already stated he would agree to do." *Id.* at 191-92.

[9] *See, e.g.*, *United States v. Burnside*, 588 F.3d 511, 520 (7th Cir. 2009) ("not all judicial observations expressed with respect to plea agreements violate the rule"); *United States v. Robinson*, 587 F.3d 1122, 1127 (D.C. Cir. 2009) (no violation where judge's statements "were not partial" and "did not convey a misleading impression as to the court's role"); *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996) (indicating that statements that cannot "be read as coercive" do not violate the rule); *United States v. Frank*, 36 F.3d 898, 902-03 (9th Cir. 1994) (emphasizing that the Rule "does not establish a series of traps for imperfectly articulated oral remarks").

3. The Impact Of A Judge's Improper Intervention, Though Almost Certainly Significant, Can Be Difficult To Pinpoint

The speculative nature of any attempt to pinpoint the effect of judicial pressure on the plea process further counsels against an individualized prejudice inquiry.

This Court has at times identified "the difficulty of assessing the effect of [an] error" as reason enough not to demand an individualized prejudice inquiry. *Gonzalez-Lopez*, 548 U.S. at 149 n.4. The Court, for instance, has declined to require a defendant who was involuntarily medicated at trial to attempt "to demonstrate how the trial would have proceeded differently" had the medication not been administered. *Riggins v. Nevada*, 504 U.S. 127, 137 (1992). Such an inquiry, the Court understood, "would be purely speculative." *Id.* The Court has reached the same conclusion with respect to a trial court's improper refusal to allow defense counsel to make a closing summation. "There is no way to know whether" such a denial "might have affected the ultimate judgment," even when it is a bench trial and the judge insists that nothing counsel might have said would have made a difference. *Herring v. New York*, 422 U.S. 853, 863-64 (1975); *see also Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (describing the consequences of a defective reasonable doubt instruction as "necessarily unquantifiable and indeterminate"); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (noting that "the benefits of a public trial are frequently intangible [and] difficult to prove"); *Geders v. United*

States, 425 U.S. 80, 86 (1976) (declining to require specific showing of prejudice when a defendant is denied access to counsel during an overnight recess).[10]

This Court has specifically recognized the difficulties that can arise when it comes to assessing prejudice in the plea context. Decisions "involving plea bargains and cooperation with the government," the Court has observed, "do not even concern the conduct of the trial," and "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternative universe." *Gonzalez-Lopez*, 548 U.S. at 150. Elsewhere, the Court has noted that "the plea-bargaining process is often in flux," *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), and that there is "uncertainty inherent in plea negotiations," *Premo v. Moore*, 131 S. Ct. 733, 737 (2011). *See also id.* at 741 ("Plea bar-

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[10] The Courts of Appeals have recognized additional instances in which the difficulty of pinpointing the effect of an error makes case-specific prejudice analysis inappropriate, including cases in which the district court runs afoul of Federal Rule of Criminal Procedure 23(b) by using a jury with less than 12 members, contravenes Rule 24(c) by allowing alternate jurors to participate in deliberations, or violates Rule 32(i)(4)(A)(ii) by denying the defendant an opportunity to allocute at sentencing. *See, e.g.*, *Webster v. United States*, 667 F.3d 826, 833 (7th Cir. 2011) (less than 12 jurors); *United States v. Curbelo*, 343 F.3d 273, 280 (4th Cir. 2003) (same); *Manning v. Huffman*, 269 F.3d 720, 726 (6th Cir. 2001) (participation of alternate jurors in deliberations); *United States v. Ottersburg*, 76 F.3d 137, 140 (7th Cir. 1996) (same); *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007) (allocution); *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001) (same).

gains are the result of complex negotiations suffused with uncertainty[.]").

With respect to judicial participation violations in particular, courts face at least four major obstacles to conducting a meaningful individualized prejudice inquiry. First, and most fundamentally, judicial participation transforms the entire complexion of the pretrial process and "taint[s] everything that follow[s]." *Cano-Varela*, 497 F.3d at 1134. As already noted, *see supra* at 21, the problem is not just that the judicial intervention alters the defendant's plea calculus; it is also that it changes the relationship between the defendant and his attorney. This subversion of the adversary process makes the precise impact of a judge's intervention extremely difficult to isolate.

Second, it is important to bear in mind that, when assessing the effect of a judge's comments, the pertinent question is not whether the defendant would have decided to enter *a* guilty plea had the judge not intervened and encouraged the plea. It is whether the comments influenced the defendant's decision to enter *the specific* plea he ultimately accepted. *Cf. Dominguez Benitez*, 542 U.S. at 76 (considering whether, but for the error, the defendant "would not have entered *the* plea" (emphasis added)). Thus, even if a reviewing court might sometimes be confident that the defendant would have pleaded guilty absent the judge's advocacy, the court will very rarely be able to conclude with any degree of certainty that the contours of the plea would have been the same. The judge's intervention may well mean that the defendant's attorney does not drive as

hard a bargain or that the defendant accepts a deal he might otherwise have rejected. Even the timing of the negotiations may make a difference. The government may be interested in the defendant's cooperation at one point in time but not another, or the perceived strength of the government's case may change as the pretrial investigation unfolds. In short, while the "pressures ... inherent in judicial intervention" "will inevitably affect the parties' own efforts to craft an agreement," "[t]he actual impact will often be difficult to quantify." *Kraus*, 137 F.3d at 457; *cf. Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) ("[E]ven if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination [in the selection of grand jurors] did not impermissibly infect the framework of the indictment and, consequently, the nature or very existence of the proceedings to come.").

Third, the record generally will provide little insight into the negotiating process or the considerations that actually animated the defendant's decision. The court typically will not have a complete account of the discussions between the prosecution and the defense or of the defendant's internal thought processes. It is also unlikely to have access to the privileged communications of the defendant and his attorney about their strategy. A defendant, moreover, will be less likely to articulate concerns or disclose possible irregularities on the record during the Rule 11 plea colloquy if he believes the court affirmatively desires his plea.

Fourth, along similar lines, defendants do not make their plea decisions according to any set criteria. They are not like jurors who are required to focus on the evidence presented, follow the judge's instructions, and apply a specific burden of proof. Of course, defendants will often consider factors such as the likelihood of conviction at trial and possible sentencing benefits of a plea. But defendants have different appetites for risk, different attitudes about issues such as cooperation with the government, and different levels of suspicion of the various actors in the process. The record will rarely offer more than a glimpse into these personal idiosyncrasies. Ultimately, these limitations mean that a reviewing court can do little more than engage in "a process of retrospective crystal-ball gazing posing as legal analysis." *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting).

The decisions of the appellate courts that purport to review judicial participation errors for harmlessness reflect this reality. Those decisions generally do not even attempt to tease out the precise impact of the judge's intervention. Instead, they merely draw the logical inference that, when a judge urges a defendant to take a particular course of action and the defendant then does so, the defendant's "substantial rights" are "obviously affected." *Cano-Varela*, 497 F.3d at 1134; *see also Baker*, 489 F.3d at 374 (finding it "implausible" and "difficult to imagine" that "a defendant ... could fail to be powerfully influenced" by the judge's comments).

For these reasons, the government is simply incorrect when it suggests that conducting an individ-

ualized prejudice inquiry in this context "is similar to the prejudice analysis required in a number of other contexts." Gov't Br. 23. For example, a court assessing "the effect of improper prosecutorial comments on a jury's decision to convict" (*id.*) has a full trial record at its disposal and knows the criteria on which the jury's verdict was supposed to rest. Meanwhile, a court is not typically called upon to consider "the effect of a lawyer's deficient advice on a guilty-plea decision" (*id.*) except in a postconviction proceeding, during which the court can conduct an evidentiary hearing to aid its inquiry. In contrast, appellate courts reviewing judicial participation claims are stuck with the limited "existing record." *Vonn*, 535 U.S. at 74; *see also Dominguez Benitez*, 542 U.S. at 83 n.9 (noting that a "significant difference" between consideration of Rule 11 claims and ineffective assistance claims is that "the latter may be raised in postconviction proceedings," which "permit greater development of the record").

4. Requiring An Individualized Prejudice Inquiry In This Context Will Undermine The Finality Of Convictions And Increase The Burden On Courts

As the government tells it, allowing appellate courts to grant relief without requiring a specific showing of prejudice would create "unjustified inroads into [the] finality" of guilty pleas and result in too many costly remands. Gov't Br. 26. The reality is just the opposite.

Significantly, even those courts that currently purport to conduct a case-specific prejudice inquiry nearly always grant relief when a defendant enters into a plea after a judge urges that course. *See supra* at 39. Those courts will simply be relieved of the burden of evaluating competing guesses about the error's effects. Moreover, declaring that defendants may be eligible for relief without a specific showing of prejudice may well reduce the number of cases like this one by sending a stronger signal that judicial exhortations to plead guilty are truly out of bounds.

If this Court were to adopt the government's preferred approach, and if the government managed to begin convincing appellate courts to refuse to allow new pleas in cases like this one, the costs would only multiply. A loss on direct appeal, after all, is not the end of the road. Many defendants will continue to pursue relief in postconviction proceedings, and in this context their claims will often be substantial enough to warrant full-fledged evidentiary hearings. They may well be able to develop a record showing that judicial pressure rendered their plea involuntary, or that their counsel acted ineffectively by failing to object or by pushing them to accept a bad deal. And to the extent defendants ultimately succeed with such collateral attacks, finality interests will be undermined to a greater extent than they would have been had those defendants simply been given a new opportunity to plead on direct appeal.[11]

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[11] This case well illustrates the problem. If Mr. Davila is denied relief on direct appeal because of counsel's failure to

The likelihood that the government's approach will simply generate more postconviction litigation runs directly counter to this Court's expressed desire for plea-related rules that "forestall[] the spin-off of collateral proceedings that seek to probe murky memories." *Boykin*, 395 U.S. at 244. One virtue of Rule 11 is that it is supposed to help courts avoid "time-wasting," "after the fact" inquiries into whether the defendant's plea was really knowing and voluntary. *Vonn*, 535 U.S. at 68; *see also McCarthy*, 394 U.S. at 465. As this Court has pointed out elsewhere, clear rules and presumptions can help to "conserve[] judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (discussing presumption of involuntariness when police elicit statements from an accused who has requested but not yet received counsel). It makes scant sense to forgo this practical benefit of a categorical rule in favor of an approach that will often require not one, but two, case-specific prejudice inquiries—a speculative one on direct appeal and then an expanded one, with additional evidence, on postconviction review.

The government's assertion that the Court of Appeals' approach "presents special problems for the government because the government has little, if any, way to prevent [judicial participation] errors from occurring" is misplaced. *Cf.* Gov't Br. 26. First, the government's inability to prevent the error is

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object to the judge's egregious remarks, he will have a strong ineffective assistance of counsel claim. His opportunity for a new plea and fair trial should not be needlessly delayed.

simply not a reason to deny relief when a defendant's rights are violated. Second, as already noted, it is highly unlikely that dispensing with an individualized prejudice inquiry will result in more cases in which the government "loses the benefit of its plea agreement." Gov't Br. 27. Third, this Court recently rejected a similar contention in a case in which the government's concern arguably had more merit. *See Frye*, 132 S. Ct. at 1407 (allowing ineffective assistance claim when defendant rejects plea agreement and proceeds to trial even though "the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene"). Finally, the government exaggerates its helplessness. A prosecutor often will be present and can guide the court away from improper commentary. And while the government may not be able to prevent all judicial impropriety, it can easily (1) tell defendants of the judicial participation ban when the parties are hammering out a plea deal, just as the government routinely informs defendants of their many other plea-related rights, *see, e.g.*, J.A. 138-39, and (2) ask whether there has been any judicial intervention so that it can be remedied without the need for an appeal.

The government also expresses concern about the possibility of defendants "reserv[ing] an objection [to judicial participation] and then strategically rais[ing] it for the first time on appeal." Gov't Br. 26. There is no claim that any such gamesmanship occurred in this case. Nor is there any evidence that it is has ever actually been a problem in those circuits that routinely grant relief even when a judicial participation claim is newly raised on appeal. As this Court has noted elsewhere, the risks inherent in an

appeal from a guilty plea limit potential abuse. Defendants who "attack their guilty pleas lose the benefit of the bargain obtained" and may end up with "*a less favorable* outcome." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485-86 (2010). To the extent there are actual indications of strategic behavior in a given case, courts are entirely capable of dealing with them, including by holding that the defendant's claim has been affirmatively waived or by holding that the interests of justice do not warrant a remedy.

D. Because Judicial Exhortation Errors Differ In Kind From Plea-Colloquy Defects, *Vonn* and *Dominguez Benitez* Are Inapposite

The government repeatedly suggests that *Vonn* and *Dominguez Benitez* somehow "demand" an individualized prejudice inquiry in this case. Gov't Br. 16. But, as already noted, those cases involved a very different sort of Rule 11 error. It makes no more sense to extend their analysis to judicial participation errors than it would to apply the remedial analysis for a Confrontation Clause violation to a case involving the denial of a public trial simply because both rights happen to reside in the Sixth Amendment. *Cf. Baker*, 489 F.3d at 372 ("Obviously, not all Rule 11 violations are created equal.").

While those decisions sometimes refer generically to "Rule 11 error," *see, e.g.*, *Dominguez Benitez*, 542 U.S. at 80, the Court did not suggest that every Rule 11 violation requires identical remedial analysis. To the contrary, the Court went out of its way to acknowledge that all plea-related errors are not

alike. It indicated that, if, as in *Boykin*, the record was devoid of evidence that the defendant "knew of the rights he was putatively waiving," then not even "overwhelming evidence that the defendant would have pleaded guilty regardless" would suffice to save the conviction. *See id.* at 84 n.10.

In neither *Vonn* nor *Dominguez Benitez* did the judges' omissions suggest any irregularity in the plea negotiation process that might have cast doubt on the validity of the defendants' pleas. And, in stark contrast to this case, they certainly did not inject an element of coercion into that process and interfere with the defendants' decisions about whether, when, and how to negotiate with the government about a possible plea deal. The errors did not occur until *after* the defendants had entered into plea agreements and proffered their pleas. It is entirely unsurprising that the Court in those cases would have been reluctant to allow the defendants to replead without some specific indication that the omitted information would have altered their willingness to go forward with the agreements they had reached. This case calls for a different analysis and different result.

II. MR. DAVILA WOULD PREVAIL EVEN UNDER THE GOVERNMENT'S PREFERRED APPROACH TO PREJUDICE

A. The Plain-Error Standard Should Not Apply

As an initial matter, any individualized prejudice analysis should not take place in the plain-error

framework of Rule 52(b). Because the government has conceded the first two prongs of the plain-error standard (that there is error and that the error is plain) and has never contested the fourth prong (that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotation marks omitted)), the sole consequence of applying plain-error review in this case would be to place "the burden of persuasion with respect to prejudice" on Mr. Davila. *Id.* at 734. If review is for harmlessness, then it would be up to the government to show that prejudice is lacking. *Id.* While Mr. Davila should prevail regardless of where the burden lies, if the Court concludes that the burden may be outcome-determinative, the Court should require the government to bear it. *Cf. O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (indicating that the burden matters only when there is "grave doubt" about prejudice).

To justify plain-error review, the government points to the lack of a timely objection to the magistrate judge's improper intervention. *See* Gov't Br. 11. But unless a party has a "meaningful opportunity to make a contemporaneous objection," the failure to object cannot be held against him. *United States v. Smith*, 640 F.3d 580, 586 (4th Cir. 2011) (internal quotation marks omitted); *see* Fed. R. Crim. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."). In this case, it would be unrealistic to demand an objection and unreasonable to fault Mr. Davila for failing to have made one.

The objectionable conduct here occurred during a hearing called by the court to address Mr. Davila's complaints about his appointed counsel, including his complaint that counsel was pressing him to plead guilty. Because Mr. Davila was represented, the onus was on his attorney, not on him, to register objections at that hearing. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 93 (1976) (Burger, C.J., concurring) (noting that the lawyer, "not the client, has the immediate—and ultimate—responsibility of deciding if and when to object"). But given the nature of the hearing, counsel was obviously not representing Mr. Davila's interests in the usual sense. When the magistrate judge made his improper remarks, he was essentially coming to counsel's defense and amplifying counsel's own advice about pleading guilty. It is unsurprising that counsel did not object on Mr. Davila's behalf to statements that were music to counsel's ears. *See Cano-Varela*, 497 F.3d at 1132 (where "the district judge's communications with [the defendant] were intended to assist defense counsel in persuading the defendant to follow counsel's advice ..., it is understandable that counsel would not object"). Considering these unusual dynamics, it hardly seems fair to penalize Mr. Davila for counsel's oversight, and doing so will do little to advance the cause of encouraging timely objections. *See id.*; *see also Baker*, 489 F.3d at 372.[12]

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[12] At the certiorari stage, the government questioned whether Mr. Davila adequately preserved the argument that the plain-error standard is inapplicable. Reply Br. 10. Because Eleventh Circuit precedent appeared to dictate plain-error review but nevertheless provided relief without a specific showing of prejudice, counsel had no reason to question the

B. The Judge's Improper Intervention Affected Mr. Davila's Plea Decision

Even under Rule 52(b), this Court should conclude, for the reasons stated in Part I, that Mr. Davila need not make a specific showing of prejudice to establish an effect on "substantial rights." Mr. Davila would plainly prevail, however, even if a particularized prejudice inquiry were required. While this case confirms that such an inquiry is inherently speculative, even the limited record below virtually compels the inference that the judge's intervention—urging Mr. Davila to "come to the cross"—affected Mr. Davila's plea calculus. This is so regardless of where the burden of persuasion lies.

Mr. Davila, the record reveals, was long adamant about his desire to exercise his trial rights. During his competency evaluation, he was emphatic that he wanted "to 'fight [the] charges in court with a jury trial.'" Docket Entry 38, at 8-9. He later wrote to the court to complain that his attorney was press-

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applicable standard. Despite this, counsel—the same court-appointed attorney who represented Mr. Davila in the district court and initially filed an *Anders* brief in the Court of Appeals—did expressly note that at least one other circuit had questioned the appropriateness of plain-error review. *See* 10-15310 Docket Entry at 19 n.7 (Aug. 19, 2011). In any event, if this Court decides, contrary to the Court of Appeals, that the harmless versus plain-error distinction matters, then in fairness Mr. Davila should have an opportunity to address it, particularly since "parties are not limited to the precise arguments they made below" in support of their claims (here, the claim that the judicial participation violation entitles Mr. Davila to replead). *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

ing him to plead guilty and refusing to give him any other options. *See* C.A. E.R. Ex. B. It was that complaint that prompted the in camera hearing during which the judge made his improper remarks.

The in camera hearing marked a turning point. It is difficult to imagine a defendant who would have been unaffected by the judge's insistent remarks. The judge decisively sided with Mr. Davila's appointed counsel, whose advice to plead guilty Mr. Davila had long resisted. Mr. Davila was told that "there may not be a viable defense" to the charges against him, that it would be unwise to "wast[e] the Court's time" trying "an open and shut case," that the government had "all the marbles," that he "need[ed]" an acceptance-of-responsibility reduction, and that the way to get that reduction was to "come to the cross" and admit everything.

Mr. Davila followed the judge's advice and entered into a deal with the government to plead guilty to conspiracy in exchange for the dismissal of the remaining counts. He did so despite his expressed misgivings that the conspiracy charge did not accurately describe his conduct. *See, e.g.*, Docket Entry 121, at 16. It is highly likely that he went forward with the plea at least in part because the magistrate judge had so strongly advocated that course.

None of the circumstantial evidence the government identifies supports an inference that Mr. Davila was *un*influenced by the magistrate judge's remarks. The government suggests, for instance, that the effect of the comments "was dissipated by the three-month interval between the

comments and the plea." Gov't Br. 27-28. But defendants do not forget being berated by a judge and exhorted to "come to the cross." The time lag, moreover, is easily explicable and in no way suggests that the judge's intervention did not contribute to Mr. Davila's decision to go to the bargaining table and accept the deal he did. Because the question of Mr. Davila's competency remained unresolved at the time of the in camera hearing, the parties did not have the option of immediately entering into a plea agreement. When the competency question was finally settled six weeks later, the record indicates that plea discussions quickly became active. *Cf.* Docket Entry 54, at 2 (Mar. 29, 2010) (government motion for continuance filed six days after competency determination, describing plea discussions as "ongoing"); Docket Entry 55, at 1 (Apr. 2, 2010) (response to motion for continuance, noting possibility that the case would be "resolved by agreement"). It then took several weeks for the parties to hammer out a final deal. It seems virtually inconceivable that the magistrate judge's exhortations did not have at least some influence on Mr. Davila's thinking. The government points to no *other* intervening event that may have prompted the agreement.

The government also notes that the magistrate judge did not preside over Mr. Davila's later change-of-plea and sentencing hearings. But the mere fact that someone else accepted Mr. Davila's guilty plea certainly does not show that the magistrate judge's conduct did not influence Mr. Davila's decision to enter that plea. *Cf. Vonn*, 535 U.S. at 75 (observing that there are circumstances in which "defendants may be presumed to recall information provided to

them prior to the plea proceeding"). The district court, moreover, never distanced itself from the magistrate judge's remarks or did anything else to "cure [the] error." *Cf.* Gov't Br. 28. That failure is especially problematic given that the magistrate judge conveyed the impression that he was speaking on behalf of the district court itself. *See, e.g.*, J.A. 152 (suggesting that it would be unwise to "wast[e] the Court's time" on "an open and shut case"). Where the offending comments have not been brought to light and expressly disavowed, a defendant surely cannot be said to have "effectively received th[e] remedy" he is due. *Cf.* Gov't Br. 28. As far as Mr. Davila was concerned, the district court desired a deal as much as the magistrate judge did and expected him to follow through with his change of plea.

The government's remaining arguments are equally insubstantial. The fact that Mr. Davila's attorney made a speedy trial demand after the in camera hearing says nothing about whether the magistrate judge's comments altered Mr. Davila's state of mind. There is no indication that Mr. Davila even knew that his attorney made the demand. Counsel presumably hoped that the government would negotiate with a greater sense of urgency and perhaps offer a more favorable deal if it saw the prospect of a trial on the horizon. Meanwhile, the fact that Mr. Davila did not raise the judicial participation error until the Court of Appeals flagged it may show that he and his attorney were unfamiliar with Rule 11(c)(1), but it does not show that the magistrate judge's remarks were inconsequential to Mr. Davila's decision to enter the plea. There was simply no reason for Mr. Davila to mention com-

ments he did not realize were out of bounds, especially if he believed, as he very likely did, that the district court was on the same page as the magistrate judge about the desirability of a plea.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. Pete Theodocion
J. PETE THEODOCION, P.C.
507 Walker Street
Augusta, GA 30901

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Robert M. Yablon
Mary Kelly Persyn
David W. A. Spencer
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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REPLY BRIEF

No. 12-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY DAVILA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Federal Rule of Criminal Procedure 52 "normally" requires, before the reviewing court may set aside a criminal conviction, "a specific analysis of the district court record * * * to determine whether [an] error was prejudicial." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Errors in the guilty-plea process prescribed by Rule 11 are governed by that principle. "[T]he harmless error rule of Rule 52(a) is applicable to Rule 11," Fed. R. Crim. P. 11 advisory committee's note (1983), as Rule 11(h) makes clear. The plain-error principles of Rule 52(b) apply as well, as this Court held in *United States* v. *Vonn*, 535 U.S. 55, 63 (2002). Accordingly, when a court "participate[s] in [plea-agreement] discussions," contrary to Rule 11(c)(1)'s requirements, a reviewing court must apply harmless-error review (if the error was preserved) or plain-error review (if it was not).

Respondent nonetheless maintains that a reviewing court has no choice but to vacate in every case involving a Rule 11(c)(1) error—regardless how minor the error; regardless how clear that the error had no effect on the proceedings; and regardless whether the defendant ever mentions the error. On that view, a reviewing court would be required to set aside a plea entered on the eve of trial, directly following a decision by the defendant's co-conspirators to testify against him, simply because two years earlier, a different judge had "innocuous[ly]" suggested that the defendant discuss with his lawyer the possibility of reducing the potential mandatory-minimum sentence by pleading guilty, cf. *United States* v. *Casallas*, 59 F.3d 1173, 1177 (11th Cir. 1995).

Nothing warrants that per se reversal approach. Rule 11(c)(1) errors vary in degree and kind, and the surrounding circumstances can demonstrate that a defendant was not prejudiced by a Rule 11(c)(1) error. The proper approach is thus the normal case-specific prejudice approach, which allows relief for prejudicial errors but does not disturb convictions when the error is not reasonably likely to have affected the outcome of the proceedings.

A. Rules 52 And 11(h) Require Prejudice Analysis Of Rule 11(c)(1) Violations

Respondent contends (Br. 24-30) that the drafters of the Federal Rules required, or at least expected, automatic vacatur of a guilty plea whenever a Rule 11(c)(1) error has occurred. That contention is insupportable.

Rule 52 textually applies to Rule 11(c)(1) errors the same as it applies to any other sort of error. See, *e.g.*, *Puckett* v. *United States*, 556 U.S. 129, 136 (2009) (Rule 52(b) "sets forth the consequences" for "all" cases in which an error is forfeited); *Zedner* v. *United States*, 547

U.S. 489, 507 (2006) (Rule 52(a) "presumptively applies to '*all* errors where a proper objection is made'") (quoting *Neder* v. *United States*, 527 U.S. 1, 7 (1999)). No "'strong support'" exists "to find an implied repeal of Rule 52" for Rule 11(c)(1) errors. *Zedner*, 547 U.S. at 507 (quoting *Vonn*, 535 U.S. at 65). Rule 11(c)(1) itself says nothing about remedies, and Rule 11(h) expressly *incorporates* Rule 52(a) into Rule 11 by stating that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights."

Rule 11(h) thus underscores that Rule 11 errors of every stripe are subject to the prejudice analysis that Rule 52 itself independently requires. Respondent errs in suggesting (Br. 13) that Rule 11(h) covers only "plea-colloquy errors." If that were so, the provision would appear in, or at least be expressly limited to, Rule 11(b), which governs colloquies. Instead, Rule 11(h) appears in a separate subsection and expressly applies to any "variance from the requirements of *this rule*"—*i.e.*, Rule 11. Fed. R. Crim. P. 11(h) (emphasis added). Contrary to respondent's contention (Br. 25), the standard definition of "variance"—which includes, among other things, "difference; deviation; discrepancy," *Webster's New International Dictionary* 2818 (2d ed. 1958)—squarely encompasses a departure from Rule 11(c)(1)'s requirements. See *Black's Law Dictionary* (5th ed. 1979) (making clear that, at the time Rule 11(h) was adopted, respondent's alternative definition of "variance" applied in the context of variations between pleading allegations and proof at trial). Similarly, the reference to "procedures required" (rather than "requirements") in the original version of Rule 11(h) clearly included the requirement that plea negotiations include only the parties and not the judge, which has always appeared in a sub-

section of the Rule labeled "Plea Agreement *Procedure*." Fed. R. Crim. P. 11(c) (emphasis added); see Fed. R. Crim. P. 11(e) (1983).

Respondent is wrong in asserting (Br. 28) that the advisory committee notes provide "strong support" for his construction of Rule 11(h). Rather, those notes are explicit about the drafters' purpose: "Subdivision (h)," they explain, "makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11 advisory committee's note (1983). Respondent acknowledges (Br. 27) that the notes nowhere assert that judicial-participation errors are an exception. And contrary to his contention (Br. 28-29), the notes' endorsement of how courts had handled certain *other* types of errors cannot mean that the drafters expected vacatur in every Rule 11(c)(1) case. The notes caution that Rule 11(h) "does not * * * attempt to define the meaning of 'harmless error,' which is instead left to the case law"; recognize that the "interest in finality of guilty pleas * * * is sufficiently compelling to make unsound the proposition that reversal is required even where it is apparent that the Rule 11 violation was of the harmless error variety"; and emphasize that Rule 11(h) "rejects the extreme sanction of automatic reversal." Fed. R. Crim. P. 11 advisory committee's note (1983).

Especially misplaced is respondent's suggestion (Br. 28, 30) that the drafters of Rule 11(h) expected courts to copy the relief granted in *McCarthy* v. *United States*, 394 U.S. 459 (1969), for every possible Rule 11(c)(1) error. This Court has explained that the "only serious issue" in *McCarthy* had nothing "to do with either the harmless- or plain-error rule," but instead was "simply whether the Government could extend the litigation for additional [prejudice-related] evidence" outside the ex-

isting record. *Vonn*, 535 U.S. at 66-71. In any event, *McCarthy* was decided five years before Rule 11 was amended to prohibit judicial participation, see Fed. R. Crim. P. 11 advisory committee's note (1974), and thus said nothing about how judicial-participation errors should be treated. Furthermore, "the one clearly expressed objective of Rule 11(h) was to end the practice * * * of reversing automatically for any Rule 11 error," a practice that "stemmed from an expansive reading of *McCarthy*" and "imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified." *Vonn*, 535 U.S. at 66, 70. Respondent's reliance on Rule 11(h) to reinvigorate that automatic-vacatur practice—and to breathe new life into decisions like *United States* v. *Adams*, 634 F.2d 830 (5th Cir. 1981), that interpreted *McCarthy* too broadly, see Gov't Br. 16-17—inverts both the text and the purpose of that Rule.

B. Rule 11(c)(1) Errors Do Not Automatically Affect Substantial Rights

Respondent no longer disputes the government's observation (Gov't Br. 16-20) that courts cannot invoke their supervisory power to disregard the requirements of Rules 52 and 11(h). See, *e.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997). Notwithstanding the intent of the Rules' drafters to require prejudice analysis of all Rule 11 errors, however, respondent (Br. 30-51) and his amici (*e.g.*, Law Professors' Amicus Br. 13-32) contend that courts can and should adopt an automatic-vacatur approach to violations of Rule 11(c)(1). But this Court's recognition of a "limited class" of (primarily constitutional) errors that are deemed to "'affect substantial rights'" under Rule 52(a) without a case-specific showing of prejudice, *Neder*, 527 U.S. at 7, does

not mean that Rule 11(h) contemplates that courts may fashion rules of per se reversal for particular Rule 11 errors. Such a practice is inconsistent with Rule 11(h)'s origins as a specific initiative to overturn a per se reversal approach, as well as with the nonconstitutional and prophylactic nature of Rule 11 itself. At a minimum, Rule 11(h) makes this a particularly inappropriate context for this Court to treat, apparently for the first time, the violation of a Federal Rule of Criminal Procedure as structural error (or its functional equivalent). Moreover, even assuming *arguendo* that an automatic-vacatur approach to Rule 11(c)(1) errors could be squared with Rule 11(h), such an approach would be unwarranted. See Gov't Br. 20-25.

1. A judicial presumption of prejudice for every violation of a prophylactic Federal Rule is inappropriate

a. This Court has stressed that even "'most constitutional violations'" are subject to harmless-error review, and it has recognized that "the argument for applying harmless-error analysis is even stronger" for violations of federal rules that "are not themselves of constitutional magnitude." *United States* v. *Lane*, 474 U.S. 438, 445-446 (1986) (quoting *United States* v. *Hasting*, 461 U.S. 499, 509 (1983)); see *id.* at 446 n.9. As the government's opening brief explains (Br. 20-21), structural errors considered "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights')" on harmless-error review, "without regard to their effect on the outcome," are almost always "fundamental *constitutional* errors." *Neder*, 527 U.S. at 7-8 (emphasis added); see *Puckett*, 556 U.S. at 140-141 (reserving question whether structural errors "automatically" affect substantial rights in the plain-error context). This Court has repeatedly rejected claims that a violation of a Federal

Rule is automatically prejudicial. See *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 n.6 (2004) (plea-colloquy errors); *Olano*, 507 U.S. at 737, 740 (alternate jurors present for deliberations); *Bank of Nova Scotia*, 487 U.S. at 253-254 (grand-jury errors); *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986) (same); *Lane*, 474 U.S. at 449 (misjoinder).

In particular, the Court has refused to undertake a "rule-by-rule review establishing bright-line *per se* rules whether to conduct harmless-error analysis." *Lane*, 474 U.S. at 448 n.11. "Rule 52(a)," the Court observed, "admits of no broad exceptions to its applicability." *Ibid.* "Assuming there is a 'substantial right'" at issue when a particular Federal Rule is violated, "the inquiry remains whether the error 'affects substantial rights' requiring reversal of a conviction." *Ibid.* "That kind of inquiry," the Court explained, "requires a review of the entire record." *Ibid.*; see *Hasting*, 461 U.S. at 509 ("[T]he Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless.").

b. Respondent does not dispute that Rule 11(c)(1) is a prophylactic Federal Rule, rather than a constitutional command. See Gov't Br. 20-21; cf. *Dominguez Benitez*, 542 U.S. at 83 (observing that "the violation claimed was of Rule 11, not of due process"). Respondent acknowledges (Br. 23) that Rule 11(c)(1) sweeps more broadly than the rules of certain States, a number of which allow some judicial participation in plea discussions, and he does not suggest that such state rules are unconstitutional. See, *e.g.*, N.C. Gen. Stat. Ann. § 15A-1021(a) (West 2011) ("The trial judge may participate in [plea] discussions."); Idaho Crim. R. 11(f) (similar); *McMahon* v. *Hodges*, 382 F.3d 284, 289 n.5 (2d Cir. 2004) ("In New

York State courts, a trial judge is permitted to participate in plea negotiations with criminal defendants."); see also, *e.g.*, Vt. R. Crim. P. 11 reporter's notes (observing that Vermont "departs" from the federal rule by permitting on-the-record judicial participation in plea discussions and noting "advantages to the defendant in having some advance sense of the judge's position"); American Bar Ass'n, *ABA Standards for Criminal Justice: Pleas of Guilty* § 14-3.3(c), at 134-135 (3d ed. 1999) (observing that ABA standards previously "allowed for a more active role for judges in plea negotiations" and that "some evidence" exists "that judicial participation in plea negotiations is common in some state courts").

Yet nearly all of the decisions of this Court on which respondent relies to argue that Rule 11(c)(1) errors are per se prejudicial involved constitutional errors. See, *e.g.*, Resp. Br. 31 nn.4-5; *id.* at 41-42. Respondent appears to believe (Br. 34-38) that Rule 11(c)(1) errors should be treated like fundamental constitutional errors simply because constitutional violations (such as an involuntary plea) *could* occur if Rule 11(c)(1) is violated. But the same is true of many nonconstitutional criminal and evidentiary rules, and this Court's precedents do not support broad judicial authority to disregard Rule 52 in that circumstance. The plea-colloquy requirements of Rule 11(b), for example, like the judicial-participation bar of Rule 11(c)(1), provide a buffer against deprivation of "the jury trial guarantee and the privilege against self-incrimination." Resp. Br. 14. But the Court has held that the omission of a plea-colloquy warning is not even "colorably structural" and is subject to ordinary prejudice analysis. *Dominguez Benitez*, 542 U.S. at 76, 81 n.6.

c. Respondent cites two cases in which this Court has countenanced automatic reversal without specifically addressing whether the error was constitutional. See Br. 32 n.6 (citing *Nguyen* v. *United States*, 539 U.S. 69, 81 (2003); *Gomez* v. *United States*, 490 U.S. 858, 876 (1989)). Both were addressed in the government's opening brief (Br. 19-20, 22), and both involved *statutory* errors that resulted in an unauthorized judicial officer sitting on the case. Automatic reversal in that circumstance does not suggest that automatic reversal is appropriate for every judicial comment that crosses Rule 11(c)(1)'s prophylactic line. Cf., *e.g.*, *Olano*, 507 U.S. at 738-739 (explaining that even "egregious comments by a bailiff to a juror" are subject to prejudice analysis) (citing *Parker* v. *Gladden*, 385 U.S. 363 (1966) (per curiam)).

Respondent asserts (Br. 32) that this Court has "identified several errors" in "the plea context" that "warrant relief without a case-specific prejudice analysis." As already noted (see pp. 4-5, *supra*), respondent's interpretation of *McCarthy* is inconsistent with the Court's narrow reading of that decision in *Vonn*. See 535 U.S. at 66-69. And the errors in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), and *Brookhart* v. *Janis*, 384 U.S. 1 (1966), were of constitutional dimension. In each case, no guilty plea was validly entered, because the defendant did not affirmatively waive the rights that a guilty plea relinquishes. See *Boykin*, 395 U.S. at 242 (reversing where judge accept[ed] defendant's guilty plea "without an affirmative showing that it was intelligent and voluntary"); *Brookhart*, 384 U.S. at 8 (reversing where defendant "neither personally waived his right nor acquiesced in his lawyer's attempted waiver"). In the absence of a valid plea, no actual conviction existed,

and reversal was the only possible course. Cf. *Florida* v. *Nixon*, 543 U.S. 175, 185 (2004) ("[A] guilty plea cannot be inferred from silence; it must be based on express affirmations made intelligently and voluntarily."). A pure Rule 11(c)(1) case, in contrast, involves a constitutionally valid plea that the defendant is seeking to set aside based on the violation of a prophylactic Federal Rule.

2. Rule 11(c)(1) errors are not invariably prejudicial

Respondent's suggestion that all Rule 11(c)(1) errors have the same prejudicial impact on a decision to plead guilty is mistaken. See Gov't Br. 20-25.

a. Respondent attempts to portray Rule 11(c)(1) errors as invariably prejudicial by focusing on what he labels the "core category" (Br. 14) of Rule 11(c)(1) violations, in which the judge "exhorts" (Br. 13), "urges" (Br. 45), or "implore[s]" (Br. 37) an admission of guilt. He asserts that a judge who commits such a "core" violation necessarily "becomes an additional adversary" of the defendant (Br. 12); "cast[s] [himself] in what is essentially a prosecutorial role" (Br. 20); "gravely compromise[s] the neutrality of the court" (Br. 14); leads the defendant "to believe that his trial right is illusory and that a guilty plea is his only real option" (Br. 21); and can induce defense counsel to effectively abandon his client, so that the defendant "find[s] himself facing three prosecutors—the government, the court, and his own attorney—with no one truly acting on his behalf" (*ibid.*).

Respondent's attempt to extrapolate an automatic-vacatur rule by focusing solely on the most extreme types of Rule 11(c)(1) violations, and postulating the most extreme prejudicial effects, is misconceived. See, *e.g.*, *United States* v. *Marcus*, 130 S. Ct. 2159, 2166 (2010) (examining whether "*all or almost all* [of a certain type of] errors *always* affect the framework within

which the trial proceeds") (internal quotation marks and citation omitted). This Court has made clear that "[a]ny assumption that once a 'substantial right' is implicated it is inherently 'affected' by any error begs the question raised by Rule 52(a)." *Lane*, 474 U.S. at 448 n.11. The Court has also emphasized that a "*per se* approach to plain-error review is flawed," *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985), and that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure," *Puckett*, 556 U.S. at 143 (quoting *Johnson*, 520 U.S. at 466). An irrebuttable presumption that every Rule 11(c)(1) error is "core," or that every such error necessarily affects the outcome of the proceedings, contravenes the basic purpose of prejudice analysis—namely, to "substitute judgment for automatic application of rules" and allow a reviewing court to differentiate harmful errors from non-harmful ones, based on the nature of the error and the surrounding circumstances. *Lane*, 474 U.S. at 448 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 759-760 (1946)); see, *e.g.*, *Dominguez Benitez*, 542 U.S. at 84-85; *Young*, 470 U.S. at 16-20.

It would likewise be inappropriate and infeasible for courts to try to carve out "core" Rule 11(c)(1) errors—or some other amorphously defined subset of Rule 11(c)(1) errors involving "judicial pressure," Law Professors' Amicus Br. 10 n.4—for special treatment as automatically prejudicial error. Whether an error is structural must be assessed as a "categorical" matter. *Neder*, 527 U.S. at 14. The text of Rule 11(c)(1) does not differentiate between various types of errors, and the lines between judicially created subcategories would inevitably be blurry. Cf., *e.g.*, *State* v. *Bouie*, 817 So. 2d. 48, 56 (La.

2002) ("We concede that a fine line may at times separate a trial judge's attempts to insure that the defendant understands that a guilty plea might serve his best interest and the overbearing of a defendant's will to reach a result the court, with the best of intentions, deems appropriate."). It makes little sense to have the stark consequence of automatic vacatur turn on an indeterminate question of judicial labeling. Instead, the correct course is individualized prejudice analysis, which allows case-specific judgments that consider both the degree of the error and any circumstances tending to support or rebut the proposition that the error affected the plea.

b. Respondent's passing suggestion (Br. 40) that Rule 11(c)(1) forbids *only* so-called "core" violations is mistaken. Contrary to respondent's assertions (Br. 13), both the plain text of Rule 11(c)(1)—which bars judicial "participat[ion] in [plea] discussions"—and judicial interpretations of that text go well beyond "judicial exhortations to plead guilty." Rather, the bar encompasses statements that are well-meaning, obvious, neutral, and even discouraging of a plea.

The decision below acknowledges that the Eleventh Circuit "usually refrain[s] from inquiring into the degree of judicial participation" before granting relief. Pet. App. 4a. That court has, for example, found a Rule 11(c)(1) violation, and vacated a plea, merely because a judge—in an "innocuous" attempt "to insure that [the defendant] was making an informed decision"—pointed out the obvious fact that the mandatory-minimum ten-year sentence under the plea was "a lot better" than a mandatory-minimum 15-year sentence if the defendant were found guilty at trial and suggested that the defendant "talk to his lawyer some and see if that is really what he wants to do." *Casallas*, 59 F.3d at 1177; see also

Gov't Cert. Reply Br. 7-8 (citing other Eleventh Circuit cases). The Ninth Circuit, which also appears to have an automatic-vacatur rule, has similarly refused to examine the "degree or type of judicial involvement" and has also found a Rule 11(c)(1) violation based on apparently well-intentioned comments about the sentencing exposure of a plea compared to a trial. *United States* v. *Bruce*, 976 F.2d 552, 555, 557 (1992); see also *United States* v. *Washington*, 109 F.3d 459, 463-464 (8th Cir. 1997) (suggesting that Rule 11(c)(1) error occurred where judge helped parties determine the Sentencing Guidelines range resulting from a certain plea).

Those decisions are not isolated examples. Although courts of appeals sometimes state that comments must be "coercive" to violate Rule 11(c)(1), they construe that term so broadly that they "all appear to hold that any discussion of the penal consequences of a guilty plea as compared to going to going to trial * * *, no matter how well-intentioned," will violate Rule 11(c)(1). *United States* v. *Cano-Varela*, 497 F.3d 1122, 1133 (10th Cir. 2007) (internal quotation marks and citation omitted). The Seventh Circuit, moreover, has indicated that Rule 11(c)(1) prohibits a judge from pressuring the *government*—out of the defendant's presence—to *offer* a plea agreement. *In re United States*, 572 F.3d 301, 305-306, 310-311 (2009). The Rule additionally "prohibits participation that effectively *undermines* the parties reaching a bargain," *United States* v. *Baker*, 489 F.3d 366, 371 n.3 (D.C. Cir. 2007) (emphasis added), and courts have found violations even when the defendant does not in fact plead guilty, see, *e.g.*, *United States* v. *Tobin*, 676 F.3d 1264, 1303-1308 (11th Cir. 2012), cert. denied, 133 S. Ct. 647, 648, 658, 666 (2012) and 133 S. Ct. 885 (2013). Courts have also found Rule 11(c)(1) violations when the

judge simply attempts to speed up the plea process by indicating to the parties, following the rejection of a proposed plea agreement, the kind of plea agreement he might accept. See, *e.g.*, *United States* v. *Bierd*, 217 F.3d 15, 20 (1st Cir. 2000) (citing cases).

These different types of errors can affect different cases in different ways, and in some cases may have no effect at all. A judge's indication of what type of plea agreement he might accept would presumably not be prejudicial to the defendant if, for example, the judge recommended a plea with a lower sentencing range, the parties had already (unbeknownst to the judge) agreed to terms similar to those the judge suggested, or if the case were reassigned to a different judge who might be open to a plea that the original judge rejected. Similarly, a judge's comment on the difference in the maximum sentence between a possible plea agreement and trial would not necessarily be prejudicial if, for example, the defendant entered into an even more favorable plea agreement six months later. Nor would a slip-up in a judge's well-intentioned efforts to assure that the defendant was receiving adequate assistance of counsel in the plea process, see *Missouri* v. *Frye*, 132 S. Ct. 1399, 1406-1407 (2012), necessarily be prejudicial if, for example, the defendant had already stated in open court "that he did not intend to go to trial," *Dominguez Benitez*, 542 U.S. at 84.

The ordinary case-by-case prejudice approach advocated by the government—which is the majority approach in the circuits, including some circuits cited by respondent for the proposition that Rule 11(c)(1) errors are particularly serious, see Pet. 16-18—allows courts to assess all of the circumstances and grant relief, or not, as appropriate. Respondent's approach, however, would

unjustifiably leave no room for any court, in any circumstance, to ever find any Rule 11(c)(1) violation nonprejudicial.

3. Prejudice analysis of Rule 11(c)(1) errors is judicially administrable

Respondent does not dispute that reviewing courts must sometimes determine whether a judicial error has affected a defendant's decision to plead. He acknowledges (*e.g.*, Br. 13), for example, that Rule 11(h), as well as this Court's decisions in *Vonn* and *Dominguez Benitez*, require reviewing courts to address that very question when judges omit plea-colloquy warnings. See also, *e.g.*, *Frye*, 132 S. Ct. at 1409-1410 (claim of ineffective assistance of counsel at plea stage requires reasonable likelihood that defendant, prosecutor, and judge would have agreed on plea); *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1385 (2012) (same). He contends (Br. 41-46), however, that an inquiry into the effect of Rule 11(c)(1) violations is so unmanageable that reviewing courts should grant relief automatically, rather than attempt it.

That contention is misplaced. See Gov't Br. 23-24. Respondent's argument largely consists of the question-begging—and erroneous, see pp. 10-15, *supra*—presumption that Rule 11(c)(1) errors are inherently prejudicial. See, *e.g.*, Br. 43 (presuming that errors cause "subversion of the adversary process"); Br. 44 (presuming that "judicial intervention will inevitably affect" the negotiations) (internal quotation marks and citation omitted). The remaining concerns he asserts—that it may be difficult to determine whether the defendant would have entered the same plea, that a full record of plea discussions may not be available on appeal (if the defendant did not raise the issue in district court), and that a defendant's plea calculus may be idiosyncratic—

would apply equally to plea-colloquy errors. Yet neither the drafters of the Federal Rules nor this Court has dispensed with the prejudice inquiry in that context. See *Dominguez Benitez*, 542 U.S. at 84-85 (equating plea-related prejudice analysis with other forms of prejudice analysis); see also Fed. R. Crim. P. 11(h); *Vonn*, 535 U.S. at 74-76.

State courts, for their part, have evaluated the effect of judicial plea-related comments on a case-specific basis on direct appeal, sometimes granting relief and sometimes not. See, *e.g.*, *People* v. *Weaver*, 118 Cal. App. 4th 131, 149-150 (Cal. Ct. App. 2004) (reversing); *State* v. *McCray*, 87 P.3d 369, 371-372 (Kan. Ct. App. 2004) (affirming); *Bouie*, 817 So. 2d at 53-56 (reversing); *State* v. *Jennings*, No. A-08-248, 2008 WL 4443803, at *3-*4 (Neb. Ct. App. Sept. 30, 2008) (affirming); *People* v. *Davis*, 54 A.D.2d 913, 913-915 (N.Y. App. Div. 1976) (affirming); *State* v. *Riggans*, No. 1-09-56, 2010 WL 1175202, at *1-*3 (Ohio Ct. App. Mar. 29, 2010) (affirming in relevant part). Even if the defendant failed to supplement the record on the judicial-participation issue by raising that issue in district court (*e.g.*, in a motion to withdraw his plea), relief does not require certainty about the error's effect, but just a reasonable likelihood (not even a preponderance of the evidence) that it changed the outcome. See *Dominguez Benitez*, 542 U.S. at 76.

A finding of prejudice may be likely, for example, when the error itself was sufficiently serious and nothing in the record provides an alternative explanation for the defendant's actions. See Resp. Br. 45. But some cases will enable a court to reach a different conclusion. See *id.* at 40 n.8 (acknowledging that not every asserted Rule 11(c)(1) error has been deemed prejudicial). In

United States v. *Ebel*, 299 F.3d 187 (2002), for example, the Third Circuit found a judicial-participation error harmless where the defendant was insisting on a plea agreement with a maximum 36-month sentence; the district court agreed to impose a 37-month sentence following a plea if the parties so desired; the defendant moved to withdraw his plea only after his co-defendants were acquitted at trial; and the defendant received only a 33-month sentence. *Id.* at 189-192. And in this case, the government has, at the very least, sound arguments that respondent cannot show prejudice. See Gov't Br. 27-28; pp. 20-21, *infra*. The court of appeals could have and should have considered those arguments, rather than disregarding them entirely.

4. Automatic relief for every Rule 11(c)(1) error would have adverse consequences

Even assuming that pure policy considerations could justify treating Rule 11(c)(1) errors as automatically prejudicial, respondent errs in asserting (Br. 46-50) that his automatic-vacatur approach would benefit judicial administration and the finality of guilty pleas. As the government's opening brief discusses (Br. 25-27), his approach would in fact have a number of adverse practical consequences.

First and foremost, as already discussed, it would require relief even for defendants who clearly were not prejudiced. Second, it would encourage sandbagging, because a defendant would have nothing to lose by staying quiet about a Rule 11(c)(1) error, negotiating the best plea he can, seeing what sentence he receives, and then raising the error only if he is unhappy with his sentence. See *Vonn*, 535 U.S. at 73 (rejecting rule that would increase defendant's incentive to "choose to say nothing about a judge's plain lapse under Rule 11 until

the moment of taking a direct appeal"). Respondent suggests (Br. 50) that appellate courts can sanction such strategic behavior. But he offers no method for appellate courts to distinguish between sandbagging and good appellate issue-spotting. Nor does he offer a sound reason for dispensing with the preexisting mechanism to discourage sandbagging: the plain-error limitations of Rule 52(b). See, *e.g.*, *Puckett*, 556 U.S. at 133-134; *Dominguez Benitez*, 542 U.S. at 82; *Vonn*, 535 U.S. at 73.

Third, respondent's approach would impose serious costs on the government for errors that it cannot prevent, that may take place out of its presence, and that it could not correct. See Gov't Br. 26-27. Respondent's citation (Br. 49) of *Missouri* v. *Frye*, *supra*—a case involving a constitutional ineffective-assistance-of-counsel error that includes a prejudice component, see 132 S. Ct. at 1405, 1409—provides no support for the contention that a court can or should categorically dispense with prejudice analysis for a Rule-based error as a matter of policy.

Finally, respondent implausibly suggests (Br. 47-48) that automatic vacatur in every Rule 11(c)(1) case is *less* disruptive of the finality of guilty pleas than leaving untainted pleas in place, because it preempts claims for postconviction relief. If the mere possibility of a petition for collateral review—alleging, say, a new and different constitutional claim of ineffective assistance of counsel or an involuntary plea, *id.* at 47 & n.11—were grounds for granting automatic relief on direct appeal for every Rule-based error, then Rule 52 would do little, if any, work.

C. The Error In This Case Was Non-Prejudicial

Although the Court need not reach the issue, respondent errs in contending (Br. 51-58) that he was prejudiced in this case.

1. Respondent first asserts (Br. 51-53) that harmless-error, rather than plain-error, review should apply, because neither he nor his lawyer could have been expected to object to the magistrate judge's comments. But respondent forfeited any argument on the standard of review by adverting to it only in a parenthetical quotation attached to a "Cf." citation in a footnote of his opening Eleventh Circuit brief. Resp. C.A. Br. 19 n.7; see *Asociacion de Empleados del Area Canalera* v. *Panama Canal Comm'n*, 453 F.3d 1309, 1316 n.7 (11th Cir. 2006) (finding argument to be "waived because it appears only in a footnote in [the] initial brief and is unaccompanied by any argument"); see, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider improperly preserved argument).

In any event, the argument lacks merit. The Federal Rules encourage plea-related objections to be made before sentencing, not after, to help distinguish "meritorious second thoughts" from "mere sour grapes over a sentence"; "to combat defendants' 'often frivolous' attacks on the validity of their guilty pleas"; to allow district courts to fix their own mistakes; and to create a record. *Vonn*, 535 U.S. at 72-73 & n.10 (quoting *McCarthy*, 394 U.S. at 465); see *id.* at 73 n.10 (explaining that "[a]ny other approach is at odds with Congress's object in adopting Rule 11"). This would be an especially poor case in which to create an exception to the plain-error rule. Even assuming the failure of respondent and his counsel to contemporaneously object to the magistrate judge's comments could be excused, no reasonable ex-

cuse exists for failing to mention the comments to the district judge during the months of ensuing proceedings (including a motion to withdraw the plea) or for failing to mention them on appeal until the court of appeals discovered them on its own.

2. As the government's opening brief explains (Br. 1-8, 27-28), the record here shows no reasonable likelihood that respondent's plea was affected by the magistrate judge's comments. Respondent filed a speedy-trial motion after those comments were made; the guilty plea came three months after the comments; the district judge, not the magistrate judge, presided over the plea and sentencing proceedings; respondent represented at the plea hearing that the plea was uncoerced; respondent explained, in a later motion to withdraw his plea, that he pleaded guilty for "strategic" reasons; and respondent never once mentioned the magistrate judge's comments, either in seeking to withdraw his plea or on appeal, until the court of appeals raised them itself.

Respondent's contrary argument lacks support. Respondent states (Br. 15-16) that "the record offers no alternative explanation," aside from the magistrate judge's comments, "for his change of heart" in deciding to plead guilty. But the record contains respondent's own explanation to the district court, in support of his motion to withdraw his plea, that he pleaded guilty because he wanted to expose alleged misstatements in the indictment (which went only to the scope and manner of the conspiracy, not its existence) and because his counsel had misinformed him about the effect of the plea on a prosecution in another jurisdiction. See Gov't Br. 5-6. And respondent represented under oath that nobody forced or pressured him to plead guilty and never mentioned the magistrate judge's comments when explain-

ing his decision to plead. *Ibid.*; cf., *e.g.*, *Baker*, 489 F.3d at 370 (defendant stated at sentencing that judge's comments had influenced his guilty plea).

Respondent also cannot explain why the passage of time and a different judge are sufficient to remove the taint of a Rule 11(c)(1) error when they result from an appeal, but are insufficient when they come about in the course of the district-court proceedings. Respondent's own theory of why Rule 11(c)(1) error is prejudicial—that it essentially turns the judge into a non-neutral adversary whom the defendant and his lawyer are reluctant to displease by going to trial, *e.g.*, Br. 13-14—falls away when a new judge arrives. Respondent accordingly lacks a sound basis for proposing (Br. 57) that one judge's statements should automatically be attributed to any successive judge who does not "expressly disavow[]" those statements. Here, for example, it makes little sense to presume that respondent believed the district judge "desired a deal" (*ibid.*) and was "on the same page" (Br. 58) as the magistrate judge, when the district judge neither demonstrated an awareness of the magistrate judge's comments nor made any improper comments of his own.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY DAVILA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR 57 CRIMINAL LAW AND PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ALISON SIEGLER
ERICA ZUNKEL
UNIVERSITY OF CHICAGO LAW SCHOOL
FEDERAL CRIMINAL JUSTICE CLINIC
1111 East 60th St.
Chicago, IL 60637

DARYL L. JOSEFFER
Counsel of Record
DANIEL S. EPPS
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
djoseffer@kslaw.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are 57 legal academics and clinicians who teach and write about criminal law and criminal procedure. *Amici* include former public defenders and prosecutors with extensive first-hand experience with the systemic realities of the modern criminal justice system in general and the plea-bargaining process in particular. *Amici* submit this brief to offer their insight—based on scholarly research and practical experience—in hopes of informing the sound and consistent development of criminal procedure doctrine.

A complete list of *amici* is attached as the Appendix.

SUMMARY OF ARGUMENT

Federal Rule of Criminal Procedure 11(c)(1) forbids judicial interference in the plea-bargaining process. When a judge violates that Rule and pressures a defendant to plead guilty, an appellate court should reverse the conviction without requiring the defendant to make an individualized showing of prejudice.

I. Defendants experience tremendous pressure to plead guilty in the modern criminal justice system. That pressure begins with prosecutors. Because trials are much more time-consuming and resource-intensive than guilty pleas, prosecutors have strong incentives to use all of the power at their disposal to

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[1] The parties' written consents to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

induce defendants to plead guilty. Defense attorneys cannot necessarily be relied upon to counteract this pressure, as they, too, have strong incentives to prefer pleas. In some instances, those incentives are financial; in others, they are a function of crushing caseloads. And defendants themselves cannot ignore the reality that sentences after trial are significantly higher than those imposed after pleas. The combined force of these pressures is tremendous—so great that even genuinely innocent defendants may plead guilty to avoid lengthy sentences.

Judges must not further contribute to this pressure. This Court has made clear that the judge's role in the guilty-plea process is to ensure that a defendant's decision to plead guilty is truly voluntary. A judge should not abdicate that responsibility and instead become a second prosecutor by pressuring the defendant to plead guilty and waive his constitutional right to a trial. Rule 11(c)(1) codifies the judge's obligation not to interfere with the plea-bargaining process. A judge who violates that command creates the serious risk that a defendant's guilty plea will not be truly voluntary, given that a defendant may feel that he has no choice but to accept the judge's advice.

II. In light of the serious pressures defendants already face in the plea-bargaining process, a judge threatens the integrity of a guilty plea when he exacerbates those pressures by placing a thumb on the scale in favor of a guilty plea. Accordingly, this Court should conclude that judicial pressure during plea bargaining constitutes a structural error and mandates reversal without any inquiry into harmlessness. Although this Court has said that technical var-

iances from Rule 11 are not structural errors, see *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.6 (2004), judicial pressure to plead guilty is an error of much greater magnitude. Such errors are appropriately classified as structural, because their effects are pervasive and difficult to measure.

And while the government suggests that only constitutional errors can be structural, that is wrong; this Court's cases make clear that whether an error is structural depends on factors such as the difficulty of assessing harmlessness and the error's relationship to the criminal proceeding as a whole—not on the source of the right in question. In any case, the error here at the very least implicates serious constitutional concerns: Judicial pressure to plead poses a serious threat to the voluntariness of a guilty plea, in violation of the Due Process Clause, as well as to the separation of powers envisioned by the Constitution.

The government contends that Rule 11(h)'s requirement that courts disregard variances that do not "affect substantial rights" precludes treating judicial-pressure errors as structural. This is wrong, as a careful analysis of the text and structure of the Federal Rules reveals. Rule 11(h)'s language is functionally identical to that of Rule 52(a), which applies to *all* errors in criminal proceedings. Because structural errors require automatic reversal, it necessarily follows that there is a class of errors that "affect substantial rights" for purposes of Rule 52(a) irrespective of whether they are harmless in the traditional sense. It thus also follows that the same phrase in Rule 11(h) does not mean that harmless-error analysis is required for all violations of Rule 11, no matter

how serious. For similar textual reasons, judicial-pressure errors necessarily satisfy the third prong of Rule 52(b)'s plain-error test.

III. Even if judicial-pressure violations are not structural errors, they should nonetheless be presumed prejudicial in the context of plain-error review. *United States v. Olano*, 507 U.S. 725, 735 (1993), contemplated that some errors should be "presumed prejudicial," and judicial-pressure errors fall within that category, both because it is exceedingly difficult for a defendant to prove individualized prejudice arising from a particular violation, and because the right in question serves to protect important process-based values.

In addition, judicial-pressure errors are especially likely to pass without objection through no fault of the defendant's. Given the potential divergence of interests between attorneys and clients in this particular context, it would be inappropriate to punish the counseled defendant for his attorney's failure to raise an objection to a violation of Rule 11(c)(1) that may be in the attorney's (but not the defendant's) interests. A presumption of prejudice, then, would appropriately reflect the realities of plea bargaining and its place in the system of criminal justice and would protect the integrity of the guilty-plea process.

ARGUMENT

I. DEFENDANTS EXPERIENCE GREAT PRESSURE TO PLEAD GUILTY, WHICH JUDGES MUST NOT EXACERBATE

A. Defendants Face Significant Pressure In The Plea-Bargaining Process

This Court recently observed that plea bargaining today " 'is not some adjunct to the criminal justice system; it *is* the criminal justice system.' " *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)). Indeed, nearly all criminal charges in the United States are resolved through plea bargains. In fiscal year 2011, for example, 96.9 percent of all federal offenders pleaded guilty.[2] See U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/FigureC.pdf. Although every defendant has a constitutional right to insist on trial and require the government to prove its case beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), very few do.

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[2] Statistics from state courts are nearly identical. See Thomas H. Cohen & Tracey Kyckelhahn, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, Bureau of Justice Statistics Bulletin (rev. July 15, 2010), *available at* http://bjs.gov/content/pub/pdf/fdluc06.pdf (in 2006, the most recent year for which data is available, 95 percent of state court convictions in the 75 most populous counties in the United States resulted from guilty pleas).

That is because defendants face overwhelming pressure, at almost every stage of the criminal process, to plead guilty. The pressure begins with prosecutors. "Trials are much more time consuming than plea bargains." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2470 (2004). Given that prosecutorial time and resources are finite, the prosecutor has a strong incentive to obtain convictions via plea and thereby "put the released resources to use in other cases." Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 309 (1983). Accordingly, prosecutors do their utmost to extract guilty pleas from defendants. In some instances, prosecutors "file more serious charges than the evidence can support" in the "hope that a defendant will be risk averse and will accept a plea to charges greater than the case's true value simply to avoid the remote chance of a conviction on far more serious charges." Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29, 85 (2002).

Defense attorneys cannot always be relied on to counteract prosecutorial pressure, because they themselves face powerful incentives to counsel their clients to accept plea offers. These incentives exist for all types of defense attorneys: retained attorneys paid by clients, court-appointed private attorneys, and full-time public defenders.[3] For a privately re-

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[3] All three types of attorneys exist in the federal criminal justice system. For those defendants who are unable to pay for their own defense, the Criminal Justice Act provides for representa-

tained attorney, cases that result in pleas require less work and move through the system more quickly, enabling the attorney to take on more cases and make more money. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1988 (1992) (noting the "sharp divergence between the economic interests of attorney and client" and "the powerful financial incentives for the attorney to settle as promptly as possible").

As for court-appointed attorneys, they often receive "cut-rate fees," which "discourag[e] careful investigation and mak[e] the bargained-for guilty plea an attractive option that counsel (perhaps more than clients) find extremely hard to refuse." Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 Colum. L. Rev. 9, 61 (1986); see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 33 (1997) ("[Appointed] defense counsel sometimes press their clients to plead guilty, since taking a high percentage of cases to trial is unaffordable."); Bibas, 117 Harv. L. Rev. at 2477 ("[A]ppointed or flat-fee defense lawyers can make more money with less time and effort by pushing clients to plead.").

And while full-time public defenders do not have a direct economic stake in plea bargains, they still have strong incentives to favor guilty pleas over trials. Public defenders face "crushing caseloads," Ber-

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tion by federal public defenders or by appointed private counsel. See 18 U.S.C. § 3006A.

ger, 86 Colum. L. Rev. at 61, and "[l]awyers who carry too many cases inevitably pressure clients to plead guilty," Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. Pitt. L. Rev. 293, 308 (2002); see also Schulhofer, 101 Yale L.J. at 1989–90. In short, when it comes to plea bargaining, defense attorneys face "serious temptations to disregard their clients' interests." Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1180 (1975).

In addition to pressure from prosecutors and their own counsel, criminal defendants must also consider the reality that sentences after convictions at trial are generally much higher than those imposed after guilty pleas. See Emily Rubin, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 Va. L. Rev. 1699, 1717–18 (1994). In federal cases, for example, the average sentence for defendants who go to trial is *three times* higher than for defendants who plead guilty to similar charges. See Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347–48 (2005).

The combined force of these pressures is tremendous—so great that even genuinely innocent defendants may plead guilty to avoid lengthy sentences. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (observing that plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense").

B. Judges Must Not Further Pressure Defendants To Plead Guilty

Although the plea-bargaining process raises concerns in light of the pressures it places on defendants, this Court has recognized it as "an essential component of the administration of justice," one that "is to be encouraged" when "[p]roperly administered." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The Court, however, has never suggested that "[p]roperly administered" plea bargaining includes judicial involvement in the bargaining process itself. Far from it: it has instead framed plea bargaining as an exercise "in securing agreement *between an accused and a prosecutor*." *Id.* at 261 (emphasis added). The judge's role, the Court has explained, begins only *after* the defendant and the government reach a plea bargain, and is to "develop, on the record, the factual basis for the plea" and to ensure that the plea is "voluntary and knowing." *Ibid.*; see also, *e.g.*, *Kercheval v. United States*, 274 U.S. 220, 223–24 (1927).

Rule 11 codifies these judicial duties. Among Rule 11's many safeguards, Rule 11(c)(1) stands out as a stark command, strictly forbidding judicial intervention in plea bargaining. It provides that the parties "may discuss and reach a plea agreement," but "[t]he court must not participate in these discussions." Fed. R. Crim. P. 11(c)(1).

That command is critically important. In a system where both prosecutors and defense attorneys have powerful, and in some cases ill-motivated, incentives to encourage guilty pleas, it is vital that judges not attempt to tip the scales even further by pressuring defendants to plead guilty. This is espe-

cially so given the life-altering consequences of a defendant's decision to waive his constitutional right to a jury trial and enter a guilty plea. When a judge violates Rule 11(c)(1) by interfering with the plea bargaining process and pressuring a defendant to plead guilty, the risk increases that the defendant's plea will not be the product of his own voluntary choice.

At issue in this case is a particular kind of judicial "participat[ion]" in plea-bargaining in violation of Rule 11(c)(1): judicial pressure to plead guilty.[4] Such violations are particularly troubling. Given the serious pressure that defendants already face, federal courts must not compound that problem by encouraging defendants to plead guilty. As many lower courts have concluded, such pressure by a judge "may coerce the defendant into an involuntary plea that he would not otherwise enter." *United States v. Werker*, 535 F.2d 198, 202 (2d Cir. 1976); see also, *e.g.*, *United States v. Casallas*, 59 F.3d 1173, 1178 (11th Cir. 1995); *United States v. Bruce*, 976 F.2d 552, 556 (9th

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[4] This brief uses the shorthand "judicial pressure" to encapsulate the particular species of Rule 11(c)(1) violation that requires automatic reversal. "Judicial pressure" includes any effort by a judge to encourage a defendant to plead guilty. This case does not present the question whether automatic reversal is required for violations of Rule 11(c)(1) that do not involve the judge pressuring the defendant to plead guilty. Other violations—such as, for example, a judge urging a defendant *not* to take a guilty plea, or a judge becoming involved in the negotiation of specific terms—do not necessarily raise the same concerns related to coercion and voluntariness that judicial pressure to plead does. This Court can determine the appropriate remedy for such violations in another case.

Cir. 1992); *United States v. Kraus*, 137 F.3d 447, 457–58 (7th Cir. 1998).

Judicial pressure creates a significant danger that a defendant may fear that rejecting a judge's suggested plea "will mean imposition of a more severe sentence after trial or decrease his chances of obtaining a fair trial before a judge whom he has challenged." *Werker*, 535 F.2d at 202; see also *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) ("When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not."), cited in Fed. R. Crim. P. 11 advisory committee's notes, 18 U.S.C. app. R. 11 (2012).

Judicial pressure may also lead a defendant to question whether he would receive a fair trial if he rejects the plea the judge endorses, as it may cause the defendant to view the judge as an adversary, rather than as "the embodiment of his guarantee of a fair trial and just sentence." Kathleen Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 Harv. C.R.-C.L. L. Rev. 29, 44 (1974).[5] And, as the Advisory Committee noted when

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[5] That is so even where, as here, the judge who pressures the defendant is not the same judge who ultimately presides over the plea hearing. A defendant who is pressured to plead guilty by a judge acting in his official capacity would have no reason to think that the judge is not speaking for the United States Judiciary as a whole; the defendant might also understandably

it adopted the Rule in question, judicial interference in the plea bargaining process "makes it difficult for the judge to objectively assess the voluntariness of the plea." Fed. R. Crim. P. 11 advisory committee's notes, 18 U.S.C. app. R. 11 (2012) (citing sources).

The facts here provide a good illustration of how the interests of appointed attorney and defendant can diverge, and how judicial pressure to plead guilty irrevocably compounds the problem. Respondent requested a new appointed attorney because his lawyer had not adequately consulted with him about the case, did not advise him of "any possible defenses," and instead urged him to "plead guilty." C.A. E.R. Ex. B. Instead of acting as an impartial judicial officer, the judge assumed the role of a second prosecutor. He told respondent that the government had "all of the marbles in this situation" and that the only option available was to "go to the cross" and admit his guilt. J.A. 159–60. The judge vouched for the defense attorney's advice when he told respondent that "there may not be a viable defense to these charges." J.A. 155. Like the defense attorney and the prosecutor, the judge believed respondent's only option was to plead guilty—and he made sure respondent knew it.

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think that the judge will convey his views about the case and the defendant to the judge who takes the guilty plea.

II. JUDICIAL PRESSURE DURING PLEA BARGAINING IS STRUCTURAL ERROR REQUIRING REVERSAL EVEN WHEN NOT PRESERVED

Certain "structural errors" "will always invalidate [a] conviction." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); see also *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). A judge threatens the integrity of a guilty plea by exacerbating the serious pressures defendants already face in the plea-bargaining process. Accordingly, this Court should conclude that judicial pressure during plea bargaining constitutes a structural error. In contrast to merely technical Rule 11 variances, such judicial interference has pernicious effects that are impossible to measure; it also implicates weighty constitutional concerns. Nor is the government correct to argue that the text of Rule 11(h) shows that judicial-pressure errors are not structural. Moreover, because judicial-pressure errors are structural, they should require reversal under Federal Rule of Criminal Procedure 52(b) even when not preserved.

A. Rule 11(c)(1) Errors Are Different In Kind From Other Rule 11 Violations

This Court has never addressed whether violations of Rule 11(c)(1) constitute structural error. Although *United States v. Dominguez Benitez* concluded that "the omission of a single Rule 11 warning without more is not colorably structural," 542 U.S. 74, 81 n.6 (2004), that statement does not apply here.

At issue in *Dominguez Benitez* was a district court's failure to advise the defendant, as required by Rule 11(c)(3)(B), that he had no right to withdraw his plea if the court did not follow the government's sentencing recommendation. *Id.* at 78. As *United States v. Vonn* explained, such "trivial" or "technical" variances from Rule 11's warning requirements do "not necessarily equate to the importance of the overarching issues of knowledge and voluntariness" that Rule 11 seeks to protect. 535 U.S. 55, 70, 71, 78 (2002); see also *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (rejecting collateral challenge to "technical violation" of Rule 11).

Treating merely technical variances from Rule 11's colloquy requirements as non-structural error makes sense. During a plea colloquy, the judge acts as a backstop, repeating advice the defendant will, in virtually all cases, have already received from another judge, from the written plea agreement, or from the defense attorney. The judge merely provides second-level protection. In the rare case where the defendant has not received the required information from another source, relief is available, but there is no need to treat such errors as categorically requiring reversal.

Not all Rule 11 violations deserve the same treatment, however. Indeed, *Vonn* made this clear when it criticized certain courts of appeals for "treat[ing] all Rule 11 lapses as equal." 535 U.S. at 70. Unlike "trivial" Rule 11 violations, judicial pressure during plea bargaining implicates "the overarching issues of knowledge and voluntariness" with which Rule 11 is concerned. *Ibid.* As explained, judi-

cial pressure to plead can undermine the defendant's own preferences, especially in light of the overwhelming pressure from other actors in the system; it can cause the defendant to question whether he will receive a fair trial; and it can make it difficult for a judge accurately to assess whether the guilty plea is in fact voluntary. For these reasons, this Court's conclusion that some Rule 11 violations are not structural does not control here.

B. Judicial Pressure During Plea Bargaining Has Effects That Are Pervasive And Impossible To Measure

This Court has made clear that whether an error is structural "rest[s] . . . upon the difficulty of assessing the effect of the error." *Gonzalez-Lopez*, 548 U.S. at 149 n.4; see also, *e.g.*, *Sullivan*, 508 U.S. at 282 (concluding that trial court's failure to give reasonable-doubt instruction "unquestionably qualifie[d] as 'structural error'" because its "consequences . . . are necessarily unquantifiable and indeterminate"). As a related point, structural errors have a pervasive impact on the entire criminal process, "affecting the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. It is hard to assess the impact of a structural error precisely because it is difficult, if not impossible, to isolate the error from the other aspects of the process.

Judicial pressure in the plea-bargaining process satisfies these criteria. Such interference affects the defendant's fundamental decision to enter a guilty plea or proceed to trial and impacts the defendant's strategic decisions in unknowable ways. Where a judge has not merely abdicated his responsibility to

"ensure that the plea is voluntary," *Gonzalez v. United States*, 553 U.S. 242, 258 (2008) (Scalia, J., concurring in the judgment), but has affirmatively interfered with the defendant's decision-making process, it is impossible to know whether and to what degree the judge's interference affected the defendant's ultimate choice to waive his rights.

It is also impossible to assess whether the defendant would have accepted the same plea agreement or would have sought a more favorable agreement absent the judicial pressure. For this reason, this Court has explained that an inquiry into harmlessness in the plea-bargaining process "would be a speculative inquiry into what might have occurred in an alternate universe," because "[i]t is impossible to know what different choices" would have been made absent the error, "and then to quantify the impact of those different choices on the outcome of the proceedings." *Gonzalez-Lopez*, 548 U.S. at 150.

Moreover, requiring Rule 11(c)(1) violations like the one here to satisfy harmless-error analysis would fundamentally misunderstand the right at stake. The Rule protects a defendant's right to make a decision to plead free from additional pressure beyond the pressure already brought to bear by the prosecutor and the defendant's own lawyer. The Rule would become a virtual nullity if it could be disregarded as long as an appellate court concludes that the defendant would have pleaded guilty anyway. Given the realities of our criminal justice system, pleading guilty rather than going to trial is almost always in a defendant's best interest. Allowing judges to speculate about what a defendant would have done absent the

coercion—based on an assessment of information that is unlikely to even be in the record after a plea, such as the strength of the evidence—would mean that defendants would have a meaningful right to plead guilty free from judicial pressure only in those rare cases in which an appellate court concludes that pleading guilty was the wrong call.

Rule 11(c)(1), as it applies to judicial-pressure situations, requires more, for it serves to protect the integrity of the process itself. Reducing the Rule to one that effectively forbids judicial pressure only where that interference can be proven to have made a difference ignores that the Rule "commands, not that a [guilty-plea proceeding] be fair, but that *a particular guarantee of fairness be provided*," cf. *Gonzalez-Lopez*, 548 U.S. at 146 (emphasis added)—namely, that a judge not interfere with the defendant's decision-making process by further pressuring him to plead guilty. See also *id.* at 419 n.4 (rejecting argument that "*only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural").

C. Judicial Pressure During Plea Bargaining Also Implicates Serious Constitutional Concerns

The government asserts that the error here cannot be structural because it lacks "constitutional dimension." Gov't Br. 22. But the government concedes that this Court has never held that a constitutional violation is actually required for an error to qualify as structural. *Ibid.* That concession was wise, because it is anything but clear whether the source of law—constitution, statute, or rule—from which a

right is derived should be dispositive in the structural-error inquiry. As explained above, whether an error is structural turns on the difficulty of assessing harmlessness and on the error's relationship to the criminal proceeding as a whole—not on which book one must look in to locate the right.

In any case, the government is wrong to assert that judicial-interference errors lack "constitutional dimension." Whether or not such interference rises to the level of an independent constitutional violation in every case, violations of Rule 11(c)(1), like the one here, certainly implicate weighty constitutional concerns.

1. The Due Process Clause requires pleas to be both knowing and voluntary. See *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Given its high potential for coercion, judicial pressure in plea bargaining poses a serious threat to the voluntariness of a defendant's guilty plea. Cf. *Walker v. Johnson*, 312 U.S. 275, 286 (1941) (holding that a defendant who is "deceived or coerced by the prosecutor into entering a guilty plea . . . [is] deprived of a constitutional right"); see also *Waley v. Johnston*, 316 U.S. 101, 104 (1942).

Lower courts have recognized precisely these concerns in treating Rule 11(c)(1) errors as requiring reversal. The Ninth Circuit, for example, has noted "judicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty." *Bruce*, 976 F.2d at 556; see also *Kraus*, 137 F.3d at 457 (stating that coercive pressure on the defendant is "inherent in judicial inter-

vention"). It is irrelevant whether the judge intends to coerce the defendant into pleading guilty; judicial pressure to plead guilty colors the defendant's understanding of his options in a way that is inherently coercive. "[I]t is the defendant's perception of the judge that will determine whether the defendant will feel coerced to enter a plea." *Werker*, 535 F.2d at 202.

2. Judicial pressure during the plea-bargaining process also threatens important separation-of-powers values uniquely applicable in the federal context. This Court has been "vigilan[t]" of the danger inherent in allowing the judicial branch to engage in "'tasks that are more properly accomplished by [other] branches.'" *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Morrison v. Olson*, 487 U.S. 654, 680–81 (1988)). The role of the judiciary is to decide cases, not prosecute them. When a judge places a thumb on the scale of the defendant's guilty plea decision, he essentially becomes a second prosecutor and takes on an executive function. That the prosecution may appreciate the judge's assistance in securing a plea does not matter, for the separation of powers protects the individual, not just the encroached-upon branch. See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

The Court has also warned that separation-of-powers violations may "impermissibly threaten[] the institutional integrity of the Judicial Branch." *Mistretta*, 488 U.S. at 383 (internal quotation marks omitted). As this Court has emphasized: "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system,

even with respect to challenges that may seem innocuous at first blush." *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011). Judicial pressure to plead guilty poses a serious threat to these values as well.

D. Rule 11(h) Does Not Mandate Harmless-Error Analysis

Rule 11(h) provides that "[a] variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights." Fed. R. Crim. P. 11(h). The government argues that Rule 11(h) "foreclose[s] any conclusion that Rule 11(c)(1) errors are structural." Gov't Br. 23. In the government's view, concluding that judicial pressure errors require automatic reversal would grant an appellate court "authority to substitute its own judgment in place of the text of the Federal Rules of Criminal Procedure." *Id.* at 16. The government's position is that Rule 11(h) forecloses the possibility of structural error because its requirement that an error "affect substantial rights" to merit reversal means that harmless-error analysis is required in all cases.

A careful analysis of the text and structure of the Federal Rules shows this argument to be a red herring. Rule 11(h)'s language is functionally identical to that of Rule 52(a), which provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a).[6]

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[6] Respondent ably explains why Rule 11(h)'s use of the word "variance" means that Rule 11(h) is inapplicable to judicial-pressure errors. See Resp. Br. 24–27. *Amici* find that analysis

The textual parallel between Rule 52(a) and Rule 11(h) creates a conundrum for the government. Although the plain language of Rule 52(a) forbids reversal if a given error does not "affect substantial rights," this Court has held that structural errors are "not subject to harmless-error analysis," *Gonzalez-Lopez*, 548 U.S. at 152, but instead "require[] automatic reversal." *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993). How can the government reconcile automatic reversal for structural errors under Rule 52(a)—which by its plain terms forbids reversal for *any* errors in a criminal proceeding that do not "affect substantial rights"—with its contention that Rule 11(h)'s requirement that an error "affect substantial rights" precludes automatic reversal for *any* Rule 11(c)(1) violation? That is, how can the language "affect substantial rights" in Rule 11(h) mandate harmless-error analysis, given that the same language in Rule 52(a) appears to permit reversal without harmless-error analysis in a limited class of cases?

The government has three possible responses if it sticks to its strict reading of the phrase "affect[s] substantial rights" in Rule 11(h). None is palatable. First, the government could argue that the phrase "affect[s] substantial rights" has a different meaning in Rule 11(h) than it does in Rule 52(a)—that it man-

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persuasive, and do not seek to duplicate it here. Instead, this brief seeks to explain why, even assuming *arguendo* that the error here is properly classified as a "variance," Rule 11(h)'s requirement that the error "affect substantial rights" is satisfied without any individualized showing of prejudice.

dates harmless-error analysis in the former provision, but not in the latter. This Court has rejected similiarly inconsistent textual interpretations. See *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give the[] same words a different meaning [in different contexts] would be to invent a statute rather than interpret one.").

Second, the government could argue that Rule 52(a)'s reference to "affect[ing] substantial rights" means "was not harmless," but that Rule 52(a) contains an implicit exception to that requirement for structural errors. That reading is hard to reconcile with the Rule's broad and unequivocal language. And it proves too much: if Rule 52(a) contains within it unknown and unstated exceptions, so too should Rule 11(h), which uses essentially identical language. The government itself has dismissed this possibility. Gov't Br. 12 ("The scope of Rule 11(h) expressly encompasses all potential variances . . . .").

Third, the government might contend that Rule 52(a), to the extent that it forbids courts from providing the proper remedy for structural errors, is unconstitutional. That possibility is, to say the least, implausible. *Cf. Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (holding that a court "can refuse to [apply a Federal Rule] only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions"); see also *Gonzalez-Lopez*, 548 U.S. at 157 (Alito, J., dissenting) ("The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions.

Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a) . . . .").

This conundrum is easily solved, however, by recognizing—contrary to the government's view—that the requirement that an error "affect substantial rights" does not mandate harmless-error review in every situation. Instead, whether and how an error "affect[s] substantial rights" turns on the nature of the right in question. Many errors will not "affect substantial rights" unless they have a "a prejudicial effect on the outcome of a judicial proceeding," thereby requiring harmless-error review. *Dominguez Benitez*, 542 U.S. at 81. Where, however, the right in question is not solely concerned with fair outcomes, but instead guarantees a certain kind of *process*, see, *e.g.*, *Gonzalez-Lopez*, 547 U.S. at 147–48, a violation of the right necessarily "affect[s]" the defendant's "substantial right[]" to the particular process in question for purposes of Rule 52(a). Cf. *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (suggesting that, for purposes of Rule 52(b), "certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial").

So too with Rule 11(h). Most technical variances from Rule 11's provisions will not satisfy Rule 11(h) unless they can be shown to have had a prejudicial effect on the outcome. But where, as here, the type of error in question is one that should properly be classified as structural—*i.e.*, one that "affect[s] substantial rights" irrespective of any individualized proof of prejudice—an appellate court's reversal

without a separate harmless-error inquiry does not "override Rule 11(h)," Gov't Br. 18.

E. Because Judicial Interference With Plea Bargaining Is A Structural Error, The Plain-Error Test Is Also Satisfied

The plain error standard in Rule 52(b) applies to all errors that are "not timely raised in district court." *United States v. Olano*, 507 U.S. 725, 731 (1993); see also Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). "Rule 52(b) authorizes an appeals court to correct a forfeited error only if (1) there is an error, (2) the error is plain, (3) the error affect[s] substantial rights .... [and] (4) ... the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Henderson v. United States*, 133 S. Ct. 1121, 1126–27 (2013) (internal quotation marks and citations omitted; final alteration in original). Because the error here is properly classified as structural, it satisfies this test despite respondent's failure contemporaneously to object.[7]

1. This Court has left open the possibility that structural errors may "automatically satisfy the third prong of the plain-error test," *Puckett v. United States*, 556 U.S. 129, 140 (2009)—that is, the "possibility that ... 'structural errors' might 'affect sub-

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[7] The government has explicitly conceded that there was "error" here that was "plain." Gov't Br. 27. Given that Rule 11(c)(1) is a firm command, it is hard to see how judicial pressure would ever fail to satisfy these first two prongs of the *Olano* analysis.

stantial rights' regardless of their actual impact on an appellant's trial," *Marcus*, 130 S. Ct. at 2164; see also *Olano*, 507 U.S. at 735 ("There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome . . . .").

Because the error here is structural and respondent did not lodge a contemporaneous objection below, this case squarely presents the issue left open in *Puckett* and elsewhere. The Court should resolve that question by concluding that structural errors automatically satisfy the third prong of the plain-error test and "affect substantial rights." Accordingly, respondent need not "show a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 76.

That conclusion follows from the text of the Federal Rules. As explained, the text of Rule 52(a) includes no exceptions—which means that (unless the Rule is unconstitutional in some applications) it applies to all errors, even structural ones. Rule 52(b) employs "the same language [about the effect on substantial rights] employed in Rule 52(a)." *Olano*, 507 U.S. at 734. Given that a preserved structural error necessarily "affect[s] substantial rights" under Rule 52(a), see *supra* Part II.D, it necessarily follows that an unpreserved structural error also always "affect[s] substantial rights" under Rule 52(b).

2. The fourth prong of Rule 52(b)'s test requires that "the error seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The government has not contested the applicability of this fourth

prong here. See Resp. Br. 52. But in any event, the requirement is easily satisfied. A judge who pressures a defendant to plead guilty certainly harms the perception of the judiciary's impartiality in a way that seriously affects both the "integrity" and the "public reputation" of the proceedings. Because judicial pressure to plead affects the public reputation of the judiciary, the guilt or innocence of the defendant is immaterial. See *Olano*, 507 U.S. at 736 ("[W]e have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.").[8]

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[8] The government has argued that ruling for respondent would upset the finality of large numbers of guilty pleas. See Gov't Br. 25–27. That argument is problematic, because it depends on the premise that federal judges violate Rule 11(c)(1) in a large number of cases. To the extent the Court shares those concerns, however, they are best addressed under *Olano*'s fourth prong, which "is meant to be applied on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142. Although judicial-pressure errors like the one here should satisfy the fourth prong, a particular instance of judicial pressure might, because of the specific facts at issue, be found not to threaten the reputation or integrity of the judiciary. This "case-specific" approach would address some of the government's finality concerns without vitiating the force of the Rule in most instances. Because the government has not contested the applicability of the fourth prong in this case, see Resp. Br. 52, the Court does not need to resolve the issue at this time.

III. EVEN IF NOT STRUCTURAL, JUDICIAL-PRESSURE ERRORS SHOULD BE PRESUMED PREJUDICIAL UNDER PLAIN-ERROR REVIEW

If the Court disagrees that judicial pressure to plead guilty is a structural error, it should nevertheless hold that this type of Rule 11(c)(1) violation affects a defendant's "substantial rights" under the third prong of the plain-error test, without requiring the defendant to make an individualized showing of prejudice. Both precedent and the practical difficulties of proof support that result.

1. *Olano* recognized that the third prong of the plain-error test—which requires the error to "affect[] substantial rights"—"*in most cases* . . . means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." 507 U.S. at 734 (emphasis added). The Court further reasoned that the plain text of Rule 52(b) establishes that "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.* The Court nevertheless contemplated situations where the defendant does not need to show individualized prejudice—and does not carry the burden of persuasion—with respect to the "substantial rights" element:

> There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. *Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.*

Id. at 735 (emphasis added). *Olano* thus clearly contemplated structural errors (which "can be corrected regardless of their effect on the outcome") *and* an additional category of errors that are not structural but that nonetheless "should be presumed prejudicial." *Ibid.*

2. Case law addressing the right of allocution under Federal Rule of Criminal Procedure 32 provides an instructive analogy. That Rule provides: "Before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii); see also *Green v. United States*, 365 U.S. 301 (1961). Although courts have concluded that violations of this Rule 32 provision are not structural errors, they have nonetheless applied a presumption of prejudice to such errors. Courts have advanced two main reasons for this approach: (1) the difficulty of proving prejudice and (2) the nature of the right.

First, courts have recognized the difficulty of proving prejudice arising from violations of the right to allocute. In that context, an appellate court would be forced to consider potentialities layered on top of potentialities. The court would have to determine what statements the defendant "would have made at sentencing, and somehow show that these statements would have changed the sentence imposed by the District Court." *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001). As the en banc Fifth Circuit explained, presuming prejudice in that situation "avoids speculation" as to what the defendant might have said, and, logically, what effect such statements

might have had on a district court's sentencing decision. *United States v. Reyna*, 358 F.3d 344, 352 (5th Cir. 2004) (en banc); see also, *e.g.*, *United States v. Landeros-Lopez*, 615 F.3d 1260, 1267 (10th Cir. 2010); *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007); *United States v. Prouty*, 303 F.3d 1249, 1253 (11th Cir. 2002).

Second, courts have presumed prejudice because of the precise nature of the allocution right. While the right of allocution (like the ban on judicial participation in plea bargaining) is derived from a Federal Rule rather than the Constitution, it bears directly on the integrity of the criminal process. Allocution preserves procedural integrity by allowing defendants the opportunity to be heard and to mitigate their punishment with their own words. See *Green*, 365 U.S. at 304 ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."). In this way, the right of allocution serves to maintain the legitimacy of the criminal sentencing process, and by extension, of the courts in general. See, *e.g.*, *Adams*, 252 F.3d at 288.

Both rationales apply here. As with denials of the right of allocution, judicial pressure errors require defendants to make a showing on plain-error review that, absent a presumption of prejudice, would be nearly impossible: The defendant would have to prove a hypothetical negative, by showing that he would not have accepted a particular plea but for the judge's participation. Cf. *Gonzalez-Lopez*, 548 U.S. at 150. How can a defendant carry this burden

beyond pointing to the substance of the coercive comments?

Consider the facts here. Respondent pled guilty after the judge (and the defense attorney) urged him to "come to the cross" and accept responsibility. He evinced regrets about his decision to plead guilty and tried to withdraw the plea. The district judge denied the request. We cannot know, and respondent cannot possibly prove, what different agreement, if any, would have been reached, or whether he would have gone to trial, absent the judge's coercive comments. For precisely this reason, the Fifth Circuit concluded that "the pressure inherent in judicial participation would seem to be reason enough to reverse a conviction when the defendant accedes to" the judge's pressure, as an appellate court could not "measure the harm" to the defendant because it could not know "what agreement, if any, would have been reached absent the judicial participation." *United States v. Miles*, 10 F.3d 1135, 1141 (5th Cir. 1993).

In addition, as with the allocution rule, the ban on judicial pressure to plead preserves the legitimacy of the system. It protects the integrity of the plea-bargaining *process*, the "critical point" for defendants in nearly every criminal prosecution. *Cf. Frye*, 132 S. Ct. at 1407. That goal is independent from—but no less important than—ensuring that only the guilty are punished. By forbidding judges from interfering in plea bargaining, Rule 11(c)(1) ensures that defendants have an opportunity to make the momentous decision whether to waive their constitutional jury-trial rights in an environment that counteracts,

rather than reinforces, the tremendous pressure that the system places on defendants to plead guilty.

3. A final reason to presume judicial interference errors prejudicial is that they are especially likely to pass without objection through no fault of the defendant's. Respondent's case is again illustrative of the larger problem. In addition to interfering in the plea negotiations, the judge refused to appoint a new defense attorney despite respondent's complaints that his attorney was pressuring him to plead guilty without reviewing his options. The judge told respondent that the attorney had clerked for him and was one of his "finest" clerks. J.A. 148. After the judge commended the attorney and his advice that respondent should plead guilty, the attorney did not object to the judge's Rule 11(c)(1) violation.

Under the circumstances, it strains credulity to think that respondent's attorney ever would have objected to the judge's comments. The judge was explicitly endorsing the defense attorney's advice that respondent "ought to plead guilty." J.A. 152. Given the divergence of incentives between clients and attorneys regarding plea bargaining, see *supra* Part I.A, it is unlikely that a defense attorney will object to judicial pressure to plead guilty, because he is typically a direct beneficiary of the judge's impermissible actions. Thus, although in many cases, "[i]t is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual," *Vonn*, 535 U.S. at 73 n.10, it is not fair to do so where the Rule at issue serves to protect against incentive conflicts between a defendant and his attorney.

Nor can the defendant himself be required to object. As the Court has recognized, "[i]t is perfectly true that an uncounseled defendant may not, in fact, know enough to spot a Rule 11 error." *Ibid.* The Court made that observation in the context of explaining that a defendant who chooses *self-representation* "assumes" the "perils" of "Rule 11 silence." *Ibid.* Here, however, respondent had *not* assumed the perils of self-representation at the time the judge made the improper remarks—and indeed was actively seeking to obtain new counsel, see Resp. Br. 4. It is manifestly unfair, then, to require him to prove that he was prejudiced when his own attorney failed to object to receiving the court's help in obtaining a guilty plea that the attorney *himself* desired. Moreover, few defendants would have the fortitude to object even if they had some understanding of the Rules. If "a trial court ought not to put counsel in the position of having to object to a suggestion that compromises the Federal Rules," *Olano*, 507 U.S. at 742 (Kennedy, J., concurring), then surely the trial court ought not put the *defendant* in the position of having to tell the judge that the judge's conduct, acquiesced in by his attorney, is inconsistent with the law.

For these reasons, this Court should adopt a presumption of prejudice for judicial-pressure errors arising under plain-error review. That result would appropriately reflect the realities of plea bargaining and its place in the system of criminal justice and would protect the integrity of the guilty-plea process.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

DARYL L. JOSEFFER
Counsel of Record
DANIEL S. EPPS
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

ALISON SIEGLER
ERICA ZUNKEL
UNIVERSITY OF CHICAGO
LAW SCHOOL
FEDERAL CRIMINAL
JUSTICE CLINIC
1111 East 60th St.
Chicago, IL 60637

Counsel for Amici Curiae

March 22, 2013

APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

Amici file this brief in their individual capacities, and not as representatives of the institutions with which they are affiliated.

Ty Alper
Clinical Professor of Law
Associate Director, Death Penalty Clinic
University of California, Berkeley, School of Law

Peter L. Arenella
Professor of Law
University of California, Los Angeles, School of Law

W. David Ball
Assistant Professor of Law
Santa Clara School of Law

Susan A. Bandes
Centennial Distinguished Professor
DePaul University College of Law

Valena Elizabeth Beety
Associate Professor of Law
Deputy Director, Clinical Law Program
Chair, West Virginia Innocence Project
West Virginia University College of Law

Adele Bernhard
Associate Professor of Law
Pace University Law School

John H. Blume
Professor of Law
Director of Clinical, Advocacy, and Skills Programs
Director, Cornell Death Penalty Project
Cornell University Law School

Josh Bowers
Associate Professor of Law
University of Virginia School of Law

Stephen B. Bright
Harvey Karp Visiting Lecturer in Law
Yale Law School

Paul Butler
Professor of Law
Georgetown University Law Center

Tucker Carrington
Assistant Professor of Law
Director, Mississippi Innocence Project
University of Mississippi School of Law

Jenny Carroll
Associate Professor of Law
Seton Hall University School of Law

Violeta Chapin
Associate Clinical Professor of Law
University of Colorado Law School

Gabriel J. Chin
Professor of Law
University of California, Davis, School of Law

Douglas L. Colbert
Professor of Law
University of Maryland Francis King Carey
School of Law

Angela J. Davis
Professor of Law
American University Washington College of Law

Steven B. Duke
Professor of Law
Yale Law School

Andrew G. Ferguson
Assistant Professor of Law
University of the District of Columbia
David A. Clarke School of Law

Alison R. Flaum
Clinical Assistant Professor of Law
Legal Director, Children and Family Justice
Center
Northwestern University School of Law

Nancy Gertner
Professor of Practice
Harvard Law School

Samuel R. Gross
Thomas and Mabel Long Professor of Law
University of Michigan Law School

Aya Gruber
Professor of Law
University of Colorado Law School

Bernard E. Harcourt
Julius Kreeger Professor of Law & Criminology
Chair, Political Science Department
Professor of Political Science
University of Chicago

Emily Hughes
Professor and Bouma Fellow in Law
University of Iowa College of Law

Vida Johnson
Visiting Associate Professor of Law
Georgetown University Law Center

Alex Kreit
Associate Professor of Law
Director, Center for Law & Social Justice
Thomas Jefferson School of Law

Ellen S. Kreitzberg
Professor of Law
Santa Clara University School of Law

Christopher Lasch
Assistant Professor of Law
University of Denver Sturm College of Law

Norman Lefstein
Professor of Law
Dean Emeritus
Indiana University Robert H. McKinney School of Law

Andrea D. Lyon
Associate Dean for Clinical Programs
Clinical Professor of Law
Director, Center for Justice in Capital Cases
DePaul University College of Law

Justin Marceau
Associate Professor of Law
University of Denver Sturm College of Law

Michael O'Hear
Associate Dean for Research
Professor of Law
Marquette University Law School

Jonathan Masur
Deputy Dean
Professor of Law
Herbert and Marjorie Fried Teaching Scholar
University of Chicago Law School

Richard H. McAdams
Bernard D. Meltzer Professor of Law
University of Chicago Law School

Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law
Director, Charles Hamilton Houston Institute for
Race and Justice
Harvard Law School

Wesley Oliver
Associate Professor
Director, Criminal Justice Program
Duquesne University School of Law

Mark Osler
Professor of Law
University of St. Thomas School of Law

Amanda C. Pustilnik
Associate Professor of Law
University of Maryland Francis King Carey
School of Law

Kathleen Ridolfi
Professor of Law
Director, Northern California Innocence Project
Santa Clara University School of Law

L. Song Richardson
Professor of Law
University of Iowa College of Law

Ira P. Robbins
Barnard T. Welsh Scholar
Professor of Law and Justice
American University Washington College of Law

Andrea Roth
Assistant Professor
University of California, Berkeley, School of Law

Elisabeth A. Semel
Clinical Professor of Law
Director, Death Penalty Clinic
University of California, Berkeley, School of Law

Giovanna E. Shay
Professor of Law
Western New England University School of Law

Alison Siegler
Associate Clinical Professor of Law
Director, Federal Criminal Justice Clinic
University of Chicago Law School

Abbe Smith
Professor of Law
Director, Criminal Defense and Prisoner
Advocacy Clinic
Georgetown University Law Center

Linda Starr
Clinical Professor of Law
Legal Director, Northern California Innocence
Project
Santa Clara University School of Law

Carol Steiker
Henry J. Friendly Professor of Law
Harvard Law School

Jordan M. Steiker
Judge Robert M. Parker Endowed Chair in Law
University of Texas School of Law

Robin Walker Sterling
Assistant Professor of Law
University of Denver Sturm College of Law

Randolph N. Stone
Clinical Professor of Law
Director, Criminal and Juvenile Justice
Project Clinic
University of Chicago Law School

Ronald S. Sullivan, Jr.
Clinical Professor of Law
Edward R. Johnson Lecturer on Law
Director, Harvard Criminal Justice Institute
Harvard Law School

Kim A. Taylor-Thompson
Professor of Clinical Law
New York University School of Law

Deborah Tuerkheimer
Professor of Law
DePaul University College of Law

Ronald Tyler
Associate Professor of Law
Director, Criminal Defense Clinic
Stanford Law School

Robert Weisberg
Edwin E. Huddleson, Jr. Professor of Law
Stanford Law School

Charles D. Weisselberg
Shannon Cecil Turner Professor of Law
University of California, Berkeley, School of Law

AMICUS CURIAE BRIEF

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AND
BRIEFS

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY DAVILA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JONATHAN HACKER
CO-CHAIR, SUPREME COURT AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5285

JOHN B. OWENS
Counsel of Record
DANIEL B. LEVIN
MICHAEL J. MONGAN
JOHN P. MITTELBACH
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue,
35th Floor
Los Angeles, CA 90071
(213) 683-9100
john.owens@mto.com

Counsel for Amicus Curiae

March 22, 2013

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INTERESTS OF AMICUS CURIAE

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Respondent in *United States v. Davila*, No. 12-167.[1]

NACDL, a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of a crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice. In furtherance of these objectives, NACDL files approximately 50 *amicus*

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored any part of the brief, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

This case presents a question of great importance to the NACDL and its clients because the vast majority of criminal prosecutions end in plea bargains. The NACDL has a particular interest in protecting the integrity of plea bargains by ensuring that a defendant's decision to plead guilty is free from the undue influence that inherently occurs when judges participate in plea negotiations.

SUMMARY OF ARGUMENT

A defendant who pleads guilty forfeits core constitutional protections. *See United States v. Ruiz*, 536 U.S. 622, 623 (2002). It is therefore critical that pleas are voluntary and free of coercion. *See Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). Federal Rule of Criminal Procedure 11(c) creates a key bulwark against coercion by barring judges from participating in plea negotiations. The rule followed by the Eleventh Circuit below, which holds that judicially influenced plea decisions are inherently prejudicial, is the proper approach for analyzing violations of Rule 11(c).

Because the NACDL and its members have extensive experience with plea negotiations, it submits this brief to address three matters implicated by the question presented in this case. First, as a matter of practice, judicial involvement in plea negotiations has a deeply disruptive effect on the course of those negotiations. The participation of a judge is inherently coercive because it places defendants in the unfair position of either speaking out at the risk of drawing the judge's ire or accepting a plea that they otherwise would have rejected.

Judicial involvement in plea negotiations also risks leaving defendants with false expectations of their sentence when accepting a plea, especially when judges intervene in the negotiations with an incomplete understanding of the case. As a result, judicial pressure asserted during plea negotiations undermines the integrity of the plea process and increases the risk that innocent defendants will plead guilty.

Second, a rule treating judicial interference in the plea process as inherently prejudicial is not disruptive of the criminal justice system. The three federal circuits that have followed this approach for the last twenty years account for nearly half of all federal criminal cases nationwide. Judges in these circuits still retain substantial latitude to oversee plea negotiations in a manner that is consistent with Rule 11(c). Indeed, notwithstanding the parade of horribles in its brief, the government has failed to identify a single instance from any of these circuits where a plea was vacated based on a stray comment by the judge. To the contrary, it is the rule advanced by the government that would be difficult to administer or apply fairly.

Third and finally, given the inherently disruptive effect that judicial participation has on plea negotiations, it makes sense to treat violations of Rule 11(c) as inherently prejudicial without conducting an individualized inquiry. Attempting to discern the impact of the judge's comments on a defendant's plea decision based on a limited, cold record necessarily invites speculation. In light of the fundamental rights implicated in plea bargains and the minimal work necessary to remedy a Rule 11(c) violation, treating judicial participation in plea

negotiations as inherently prejudicial is a better approach.

ARGUMENT

I. JUDICIAL PARTICIPATION IN PLEA NEGOTIATIONS DISRUPTS AND UNDERMINES THE PLEA BARGAIN PROCESS

There is good reason why Rule 11(c) expressly provides that "[t]he court must not participate" in plea negotiations. When a judge exhorts a criminal defendant from the bench to plead guilty, it is inherently coercive. Experience shows that defendants subjected to such coercion are more likely to accede to a guilty plea—even if they are innocent. And the involvement of the court in negotiations undermines the integrity of the proceedings.

A. Judicial Intervention in Plea Negotiations Puts Defendants in an Impossible Predic ament

By participating in plea negotiations, a judge places a criminal defendant in a fundamentally unfair position. A defendant facing a federal criminal trial, and the possibility of years or decades in federal prison, is already "in a state of mental tension and great apprehension." *United States v. Tateo*, 214 F. Supp. 560, 565-66 (S.D.N.Y. 1963) (Weinfeld, J.). This uniquely difficult situation makes defendants particularly susceptible to judicial pressure to waive their constitutional right to trial in favor of the promise of a reduced sentence by accepting a plea bargain. *See* Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. Pa. L. Rev. 865, 891 (1964). The pressure asserted by a supposedly neutral judge in plea

negotiations is "quite different" from that arising from plea negotiations with a prosecutor, whom a defendant recognizes as an adversary. *See U.S. ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 255 (S.D.N.Y. 1966) (Weinfeld, J.). A judge wields the power of overseeing the defendant's trial and, ultimately, determining his sentence if convicted.

"In facilitating a plea, a judge communicates to the defendant that he desires a plea and so raises the possibility, if only in the defendant's mind, that a refusal to accept the judge's preferred disposition would be punished." *United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006) (internal quotation marks omitted). Accordingly, "[w]hen a judge suggests to a defendant, either directly or through his counsel, that he should plead guilty, the coercive effect of this suggestion is likely to be overwhelming." Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 452 (1971); *see also, e.g.*, *United States v. Bak[illegible]*, 489 F.3d 366, 374 (D.C. Cir. 2007) (Brown, J.) ("It is difficult to imagine how a defendant, faced with a potential sentence of [eight years total], could fail to be powerfully influenced by the sentencing judge's" suggestion that a plea would result in a lower sentence.); *United States v. Cano-Varela*, 497 F.3d 1122, 1133 (10th Cir. 2007) (McConnell, J.) ("[T]he Courts of Appeals all appear to hold that any 'discussion of the penal consequences of a guilty plea as compared to going to trial is inherently coercive, no matter how well-intentioned.'") (quoting *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996)).

Even innocent defendants are far more likely to plead guilty when subjected to that sort of coercion. *See* Richard Klein, *Due Process Denied: Judicial*

Coercion in the Plea Bargaining Process, 32 Hofstra L. Rev. 1349, 1401-02 (2004) ("When a defendant is told by a judge that if he doesn't admit his guilt he will receive many more years in prison if convicted after trial, even the innocent defendant may well be influenced."). Rule 11(c)(1)'s prohibition on judicial participation in plea negotiations was designed to eliminate the danger that defendants will be induced to plead guilty based on the perceived "risk of not going along with the disposition apparently desired by the judge . . . even if innocent." Rule 11 Advisory Committee Notes, 62 F.R.D. 271, 284 (1974).

The case reporters are stocked with examples of how a judge's involvement in plea negotiations can unduly influence the decision of a criminal defendant. Three of these examples will help illustrate the disruptive effect of judicial coercion.

1. *Marco Antonio Cano-Varela*

Marco Antonio Cano-Varela was one of thirty-four defendants charged in a drug and money-laundering conspiracy case. *See Cano-Varela*, 497 F.3d at 1124. He was indigent and did not speak English. *See id.* at 1124-25. His court-appointed attorney had repeatedly recommended to Cano-Varela that he plead guilty, but could not convince him to do so. *See id.* at 1128-29. While awaiting trial, Cano-Varela twice wrote letters to the court stating that he was concerned that his attorney was not allowing him to review the evidence against him in a way that Cano-Varela could understand. *See id.* at 1125. In his second letter, Cano-Varela asked for a new lawyer and expressly stated that he needed to understand the evidence against him to prepare for his "jury trial." *Id.*

In response, the court held a telephonic status conference with the prosecutor and Cano-Varela's attorney. *Id.* On the call, Cano-Varela's attorney stated that although he had at one point convinced Cano-Varela to accept a plea, Cano-Varela had since had a "change of heart" and now wanted to go to trial. *Id.* The judge asked the attorneys to explain the plea offer and, after discussing the terms, set a follow-up status conference with Cano-Varela present to "see what we can do" about facilitating a plea. *Id.* at 1126.

At the hearing, the judge asked the prosecutor to lay out the terms of the proposed plea agreement. *Id.* at 1128. The judge then called Cano-Varela and his attorney up to the bench and encouraged Cano-Varela to follow his lawyer's advice to accept the government's plea offer. The judge warned Cano-Varela that "if the government's case is as compelling as the United States says it is," then "you have very few options." *Id.* In doing so, the judge told Cano-Varela that his attorney "apparently is of the opinion that [going to trial] is a high-risk approach and it is not likely to be successful." *Id.* According to the judge, accepting a plea "would allow [Cano-Varela] *to perhaps get a much better, much lesser sentence*" than the ten-year mandatory minimum he faced if he were found guilty after trial. *Id.* (emphasis in original).

Shortly thereafter, Cano-Varela abandoned his decision to proceed to trial and accepted the government's plea offer. On appeal, the appellate court vacated the plea based on the district judge's violation of Rule 11(c)(1) by advising Cano-Varela that he faced a harsher sentence if he did not plead guilty and was convicted. *Id.* at 1134. As the appellate court observed, the judge's comments "may have coerced the defendant into entering the plea

when he otherwise would not have," which "obviously affected [Cano-Varela's] substantial rights." *Id.*

2. *Solomon Jones*

Solomon Jones was charged with participating in a conspiracy orchestrated by his co-defendant. *See Bradley*, 455 F.3d at 455. He also faced charges in a multi-count federal indictment, as well as related charges in state court, that could have put him in prison for life. *See id.* at 456. Jones had indicated that he was willing to accept a plea that would result in 10-15 years imprisonment, but refused to accept the government's condition that he serve as a cooperating witness. *See id.* at 456-57.

The case went to trial. Throughout the trial, the judge repeatedly exhorted the defendants to plead guilty. On the morning before the second day of trial, the judge took the defendants and their counsel aside and told them how strong the government's case was. The judge said that the government's opening statement had been "excellent" and that the first day of testimony had been "extraordinarily incriminatory of all the defendants." *Id.* at 457. The judge told Jones and his co-defendants that if the trial continued, "the likelihood of a life sentence is very real and very substantial." *Id.* The judge emphasized that, unlike in state court, "a life sentence in federal court is truly a life sentence." *Id.* The judge then declared a three-hour recess to allow plea discussions to continue. *Id.*

The parties were unable to reach an agreement, and the trial continued. Two weeks later, the judge again exhorted Jones and his co-defendants to plead guilty. The judge described the government's case as "one of the strongest cases ever to be brought in this courthouse" and stated that he could not believe that

the defendants had rejected the "very, very favorable, I would even say extraordinarily favorable, plea offers that had been made." *Id.* at 458.

In response, Jones told the judge that he objected to "the way you keep judging us." He noted:

> "You keep telling us to cop out, like we are already guilty."
>
> The court replied "I keep telling you that you are presumed innocent."
>
> Jones then stated "It don't seem like it."

Id. at 459. A week later, Jones and his co-defendants pleaded guilty. *Id.* The appellate court concluded that the judge's involvement in the plea negotiations "unacceptably influenced the Defendants' decision to plead guilty." *Id.* at 464. By participating in the plea negotiations, the judge "repeatedly appeared to be an advocate for the pleas rather than as a neutral arbiter, and any fair reading of the record reveals the substantial risk of coerced guilty pleas." *Id.* Accordingly, the appellate court held that Jones must be allowed to withdraw his plea. *See id.* at 465.

3. *Ana Maria Mendoza*

Ana Maria Mendoza's case illustrates how a judge's use of religious imagery amplifies the already immense pressure on a defendant to plead guilty. *See United States v. Mendoza*, 20 F. App'x 730, 731 (9th Cir. 2001). There, the judge presiding over a pre-trial motions hearing quoted from the gospel of Matthew to encourage Mendoza to plead guilty. Two days later, Mendoza did so. *Id.* The court of appeals recognized that the judge's reference to the Bible "exacerbate[ed]" the coercive effect of his participation in the plea negotiations. *Id.* Even

though a different judge actually took Mendoza's guilty plea and observed that the first judge's comments were improper, the use of religious imagery to pressure the defendant to plead guilty could not be viewed as harmless. *Id.* at 732-33.

B. Judicial Participation in Plea Negotiations Can Create a Misperception of the Sentencing Terms

Judicial participation in plea negotiations can also mislead the defendant regarding the sentence he will ultimately receive. This problem arises most commonly when a judge participates in plea negotiations without a full understanding of the facts and circumstances of the case. In those situations, when the judge opines about the potential sentences the defendant can expect with a plea, he risks creating false expectations for the defendant and undermining the integrity of the process as a result.

Kenneth Baker provides a telling example. Baker was a first time offender facing fraud charges. *Baker*, 489 F.3d at 368-69. Shortly before trial, the judge asked the government whether it had offered Baker a plea. The government responded that Baker had been offered a plea providing a sentencing range of 21 to 27 months imprisonment. *Baker*, 489 F.3d at 368. At that time, the judge had not yet reviewed the critical evidence in the case. *See id.* at 370 n.2. Despite an incomplete understanding of the facts, the judge opined that this case appeared similar to another first-offender fraud case that he had recently handled, where the judge sentenced the defendant to one year and one day because he "pled guilty early on and assumed responsibility." *Id.* at 369. The judge repeatedly stated that he would "probably be just as consistent here" with Baker's sentence. *Id.* The judge

even made a point to tell Baker that he had rejected the guideline range in that case. *Id.*

The next day, Baker pleaded guilty. In doing so, his attorney informed the court that although they had not reached a "typical plea agreement" with the prosecutor, "given the situation we'll enter a plea to the indictment." *Id.* at 369. At the sentencing hearing, Baker confirmed that his decision to plead guilty was based on the "case that [the judge] had referenced prior to my making my guilty plea of an individual who, I think you said he took a hundred and some odd thousand dollars and you gave him like a year and a day." *Id.* at 370.

The sentencing hearing went far differently from what Baker expected based on the judge's prior statements. In the meantime, the judge had reviewed the testimony of the fraud victim, an elderly woman. After Baker entered his plea, the judge commented that it was "pretty outrageous what happened. She's a vulnerable victim." *Id.* at 370 n.2. The guideline range for Baker's charges was 33 to 41 months and, not being bound by any plea agreement, the prosecutor recommended a sentence at the top of the range. The judge sentenced Baker to the guideline maximum, plus an additional 10 months for a related District of Columbia Code offense. *Id.*

In vacating the plea for violation of Rule 11(c)(1), the D.C. Circuit recognized that when the judge injected himself into the plea process, he put Baker "in a unique predicament-with no good options." *Id.* at 372. The judge in *Baker* compounded the problem by entering the fray of plea negotiations with an incomplete understanding of the case. In doing so, not only did the judge pressure Baker into pleading guilty, but Baker ultimately found himself facing a

sentence that was six times longer than he had been lead to believe and over twice as severe as the plea offered by the government. *Id.*

Kenneth Baker's experience is a particularly stark example, but it is certainly not the only one. In *Bradley*, discussed above, the judge repeatedly encouraged Solomon Jones and his co-defendants to plead guilty in the context of 10 to 20 year sentences, contrasted against the risk of facing life in prison if (or, as the judge implied, when) they were convicted. Jones ultimately "fared no better" than he would have if he had been convicted: his sentence after pleading guilty was 60 years. 455 F.3d at 459 & n.2

In *Cano-Varela*, the judge encouraged the defendant to plead guilty by contrasting a prospective sentence under the plea with the mandatory minimum of ten years in prison if convicted. *See* 476 F.3d at 1131. After Cano-Varela pleaded guilty, however, the government concluded that he did not cooperate sufficiently to justify the "safety valve" exception to the mandatory minimum sentence. *See id.* Accordingly, the mandatory minimum applied and Cano-Varela was sentenced to ten years in prison. *Id.* The government, of course, had the right to determine that Cano-Varela had not cooperated sufficiently. When the judge invoked the safety valve to encourage Cano-Varela to plead guilty, the judge created the false expectation of a substantially lower sentence that was far from guaranteed.

C. Judicial Participation Undermines the Integrity of the Proceedings

These examples demonstrate that when a judge puts his thumb on the scales in plea negotiations, the integrity of the plea agreement is compromised. Even

if Marco Antonio Cano-Varela or Solomon Jones ultimately decided to plead guilty for some other reason, "the judge's remarks tainted everything that followed." *Cano-Varela*, 497 F.3d at 1134. Under the shadow of the judge's recent encouragement to accept the plea, any colloquy regarding voluntariness was irredeemably tarnished. As the court in *Baker* put it, "the damage was done." 489 F.3d at 375.

Moreover, the taint of a judge's participation in the plea process may spill over into the trial and post-trial proceedings. "By encouraging a particular agreement, the judge may feel personally involved, and thus, resent the defendant's rejection of his advice." *Bradley*, 455 F.3d at 460 (quoting *United States v. Cannady*, 283 F.3d 641, 644 (4th Cir. 2002)). Even assuming that a judge could preside over the ensuing trial impartially, the defendant is likely to see the judge as an "adversary or at least a compromiser rather than an embodiment of his guarantee to a fair trial and an impartial sentence" unlikely to see it that way. White, 119 U. Pa. L. Rev. at 452-53; *see also Baker*, 489 F.3d at 375 ("Baker was put by the court in a position that would be reasonably perceived by a defendant as inconsistent with the court's role as a neutral arbiter of justice.").

These examples illustrate that even judges who mean no harm cannot avoid exerting undue influence on plea negotiations. *See Bradley*, 455 F.3d at 464 ("[W]e have no doubt that the district court had the best of intentions."); *Cano-Varela*, 497 F.3d at 1133 ("We do not doubt that the district court was motivated by a sincere desire to see Mr. Cano-Varela get the best possible outcome under the circumstances."). Even when judges mean well, their participation in plea bargains fosters an environment

that "hardens and embitters both the defendant who finally took the plea deal because of judicial threats, as well as the defendant who is sentenced to a greater period of incarceration because he chose to go to trial." Klein, *Due Process Denied*, 32 Hofstra L. Rev. at 1410.

II. TREATING RULE 11(C) VIOLATIONS AS INHERENTLY PREJUDICIAL DOES NOT DISRUPT THE FEDERAL CRIMINAL JUSTICE SYSTEM

A. Judges Have Significant Latitude to Oversee the Plea Negotiations Without Violating Rule 11(c)

The rule followed by the Eleventh Circuit below is comparable to the approach adopted in the Sixth and Ninth Circuits. There is no reason to believe that these circuits have opened the floodgates for reversals by treating judicial participation in plea bargains as *per se* prejudicial.

It is important to bear in mind that "[n]ot all judicial comments relating to plea agreements violate the rule." *Cano-Varela*, 497 F.3d at 1132; *accord United States v. Burnside*, 588 F.3d 511, 520 (7th Cir. 2009) ("[N]ot all judicial observations expressed with respect to plea agreements violate the rule."). The rule that treats Rule 11(c) error as inherently prejudicial applies only to judicial involvement in plea negotiations that tips the scales in favor of pleading guilty. Decades of federal cases construing Rule 11(c) make clear that courts have had no trouble distinguishing insignificant judicial comments regarding plea negotiations from Rule 11(c) violations. As the appellate court noted in *Baker*, "the federal courts as a whole have established a familiar

and generally uniform standard" for determining whether a judge's conduct violates Rule 11(c). 489 F.3d at 370.

The predecessor to the Eleventh Circuit long ago rejected the concern that a judge's stray comment will undermine a plea agreement, recognizing that "off-the-cuff remarks" by the judge do not violate Rule 11(c)(1)'s ban on judicial participation. *See Blackmon v. Wainwright*, 608 F.2d 183, 184-85 (5th Cir. 1979). In the years that followed, the circuits repeatedly have confirmed that "impromptu, unemphatic, and unrepeated" comments do not violate Rule 11(c). *United States v. Bierd*, 217 F.3d 15, 21 (1st Cir. 2000); *see also Bradley*, 455 F.3d at 462 ("[A] single brief remark during negotiations [has] been held not to constitute impermissible judicial participation in plea discussions."); *Johnson,* 89 F.3d at 783 (Eleventh Circuit opinion observing that statements that cannot "be read as coercive" do not violate Rule 11(c)(1)). Indeed, it is plain that Rule 11(c) "does not establish a series of traps for imperfectly articulated oral remarks." *United States v. Frank*, 36 F.3d 898, 903 (9th Cir. 1994).

Courts have recognized multiple types of comments relating to pleas that do not run afoul of Rule 11(c). First, judges are free to assure defendants of the competency of their counsel during plea negotiations. *See United States v. Hicks*, 531 F.3d 49, 53-54 (1st Cir. 2008) (holding that the court's assurances about counsel's competence did not amount to judicial participation in plea negotiations). Second, judges may inquire into the status of plea negotiations, *see United States v. Uribe-Londono*, 409 F.3d 1, 4 (1st Cir. 2005), and make case management decisions such as to set a deadline by which plea negotiations

must be completed. *See Cano-Varela*, 497 F.3d at 1132-33 ("Rule 11(c)(1) is not violated by a judge's comments made while implementing or planning docket or case-management decisions. One obvious example of this type of comment is a judge's refusal to extend a plea cut-off deadline."). Third, courts may, and often do, discuss the terms of a plea bargain after the agreement is reached. *See Bierd*, 217 F.3d at 21; *Johnson*, 89 F.3d at 783. Such discussions may begin before the plea agreement is reduced to its final written form. What matters is that the parties reached an agreement without the judge putting his thumb on the scales. *See United States v. Diaz*, 138 F.3d 1359, 1363 (11th Cir. 1998) (Rule 11(c) is designed "to avoid the danger of an involuntary guilty plea coerced by judicial intervention.").

United States v. Cano-Varela, discussed above, is one recent example. There, the Tenth Circuit considered a series of allegedly improper statements by the district court during the plea negotiations and concluded that the majority of those comments were unobjectionable. 497 F.3d at 1133. In particular, the appellate court concluded that the judge did not violate Rule 11(c)(1) by (i) stating that he would require the defendant to go to trial if the defendant insisted on a new lawyer; and (ii) inquiring into the type of plea deal the parties had been discussing. *Id.* The Tenth Circuit, however, recognized that the judge had crossed the line when he told the defendant that if he did not plead guilty and was convicted his "sentence . . . will be a harsh one." *Id.*

B. Treating Rule 11(c) Violations As Per Se Prejudicial Has Not Disrupted the Plea Bargain System in the Sixth, Ninth, and Eleventh Circuits

There is no evidence that a bright line rule treating violations of Rule 11(c)(1) as *per se* prejudicial has disrupted the judicial process. The Sixth, Ninth, and Eleventh Circuits handle approximately 40% of the criminal cases nationwide.[2] From 2010 to 2011, those circuits resolved over 30,000 cases. *Id.* Applying the national average that 88% of all criminal cases filed that year ended in a plea, these circuits oversaw approximately 27,000 plea bargains that year alone.[3] These three circuits have recognized that judicially influenced plea decisions are inherently prejudicial for at least 20 years. *See United States v. Adams*, 634 F.2d 830, 842-43 (5th Cir. 1981)[4]; *United States v. Corbitt*, 996 F.2d 1132, 1134 (11th Cir. 1993); *United States v. Anderson*, 993 F.2d 1435, 1438 (9th Cir. 1993); *United States v. Barrett*, 982 F.2d 193, 196 (6th Cir. 1992). Since that time, there have been hundreds of thousands of plea bargains in these circuits. But none of them has experienced the flood

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[2] *See United States Courts, Federal Judiciary Caseload Statistics, Table D-1* (Mar. 31, 2011), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/D01CMar11.pdf.

[3] *See United States Courts, Federal Judiciary Caseload Statistics, Table D-4* (Mar. 31, 2011), http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/D04Mar11.pdf.

[4] Decisions of the Fifth Circuit issued before October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

of reversals of which the government's brief warns. Indeed, the government has not identified even one plea during this time that was needlessly vacated based on a stray comment by district court during plea negotiations—let alone a flood of such cases. The Eleventh Circuit's interpretation of Rule 11(c)(1) has proven to work just fine.

Indeed, the rule sought by the Respondent is modest and easy to enforce: if a judge violates the unambiguous terms of Rule 11(c)(1) (as all parties agree the judge did in this case), the defendant should be permitted to reconsider whether he wants to enter a guilty plea in the first place. So long as judges respect Rule 11(c)(1)'s proscription—and *amicus* has no doubt they will after this case—a ruling in favor of the Respondent will hardly be a disruptive one.

III. JUDICIAL PARTICIPATION SHOULD BE TREATED AS INHERENTLY PREJUDICIAL

Given the inherently coercive effect that judicial participation has in plea negotiations, it makes sense to treat violations of Rule 11(c)(1) as prejudicial without conducting an individualized inquiry.

A. Judicial Participation in Plea Negotiations Is Not a Technicality

First, as Respondent explains in his brief at 16-30, judicial participation in plea bargaining is "qualitatively different" from the technical violations of Rule 11's plea colloquy requirements that this Court considered in *United States v. Vonn*, 535 U.S. 55 (2006), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). *See Baker*, 489 F.3d at 372. The Fifth Circuit recognized this distinction over 30 years ago. *See Adams*, 634 F.2d at 839 ("The ban on judicial

participation in plea discussions is not a 'technical' amendment to the Rule, as are, for example, the detailed explanations required of the judge [in the plea colloquy].").

A failure to provide a warning in the plea colloquy is an instance of neglect, whereas judicial participation involves "the court initiating and unilaterally acting in a manner clearly proscribed by the Rule." *Baker*, 489 F.3d at 372. Even the Circuits that inquire into individualized prejudice for Rule 11(c)(1) violations properly recognize that it is rarely necessary, because judicial participation in plea bargains "almost inevitably seriously affect[s] the fairness and integrity of judicial proceeding" *Bradley*, 455 F.3d at 463. Accordingly, the concern of "reduc[ing] wasteful reversals" at issue in *Dominguez Benitez* does not apply. 542 U.S. at 82. As discussed above, the government has not identified a single instance of a "wasteful reversal" in the Sixth, Ninth or Eleventh Circuits based on judicial participation in plea negotiations. The rationale that supported an individualized prejudice inquiry in *Vonn* and *Dominguez Benitez* is therefore absent here.

B. Attempting to Assess the Prejudicial Effect of Judicial Participation Invites Speculation

Second, there are obvious practical difficulties in any attempt to assess the prejudicial effect of a judge's participation in the plea negotiations. Such a prejudice inquiry would involve only a limited pre-trial record and whatever transcripts may be available. *See Dominguez Benitez*, 542 U.S. at 83 n.9 (noting that a "significant difference" between consideration of Rule 11 claims and ineffective assistance claims is that "the latter may be raised in

postconviction proceedings," which "permit greater development of the record"). This Court has long recognized the difficulties of attempting to assess prejudice regarding a defendant's decision to plead guilty based on the "unrevealing words of the cold record." *Von Moltke v. Gillies*, 332 U.S. 708, 729, (1948) (Frankfurter, J., concurring) ("On the record as we have it, however, I cannot tell whether the advice which, if given, would have colored the plea of guilty was actually given.").

In the context of judicial participation, the prejudice inquiry is further complicated by the widespread recognition that judicial participation in the plea negotiations renders the subsequent plea colloquy regarding "voluntariness" inherently unreliable. *See, e.g.*, *Baker*, 489 F.3d at 375; *Tateo*, 214 F. Supp. at 565-66. In *Baker*, even though the judge "strove valiantly to remedy its earlier error" with an extended plea colloquy, after the judge interfered in the plea negotiations "the damage was done." *Baker*, 489 at 375. Indeed, an inherent problem with judges participating in plea negotiations is that it "makes it difficult for a judge to objectively assess the voluntariness of the plea." Rule 11 Advisory Committee Notes, 62 F.R.D. at 284.

In light of the inherently speculative nature of any individualized prejudice inquiry regarding the effect of judicial participation in plea negotiations, as well as the widely-recognized inherent coerciveness of judicial involvement in those proceedings, treating Rule 11(c)(1) violations as inherently prejudicial is a more reliable and manageable approach.

C. The Work Required to Remedy a Rule 11(c)(1) Violation Is Minimal

Third, considering a judicially influenced plea decision as inherently prejudicial will not flood the district courts with additional work. When a plea is vacated, the only work that is undone is the sentencing hearing. If the judge's participation in the plea negotiations was in fact harmless, the defendant "may well decide to plead guilty again, but this must be a matter of his own free will and reasoned choice." *Gilligan*, 256 F. Supp. at 249. In those instances, all that is required is resentencing, which "involves a relatively small investment in judicial resources." *Adams*, 634 F.2d at 842.

If it turns out that the defendant would prefer not to plea and, instead, take his case to trial, it is his constitutional right to do so. *See California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia, J. concurring) ("[A] criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime."). Any "disruption" caused by a defendant's decision to exercise his constitutional right to a fair trial is not a basis for excusing Rule 11(c)(1) violations.

Indeed, treating judicial participation as inherently prejudicial makes the enforcement of Rule 11(c)(1) more efficient and provides clear guidance to the court, as well as the parties, in conducting plea negotiations. Engaging in the type of case-specific prejudice inquiry urged by the government would be far less efficient than an easy-to-enforce bright line rule. This is particularly true because history has demonstrated that the government does not concede that a judge's comments were prejudicial, even when that prejudice should be apparent. In each of the cases discussed in Section I above, the government

opposed vacating the pleas and argued that defendants were not affected by the judge's coercive comments during the plea negotiations. *See Baker*, 489 F.3d at 373 (government arguing that "even assuming the court plainly erred, the error did not affect Baker's substantial rights); *Cano-Varela*, 497 F.3d at 1134; *Bradley*, 455 F.3d at 463; Brief of Appellee United States at 18-20, *United States v. Mendoza*, No. 00-50322, 2001 WL 34098572 (May 2001).

D. Treating Judicially Influenced Plea Decisions As Inherently Prejudicial Helps Preserve the Integrity of the Plea Bargain Process

Finally, treating judicial interference in plea bargains as inherently prejudicial protects the integrity that is critical to the plea bargain process. "[A] defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees." *Ruiz*, 536 U.S. at 623. Rule 11's prohibition on judicial participation in plea bargains spares defendants from the inherently coercive effect that a judge's comments have on a defendant's plea decision. "[A] coerced plea, of course, would violate a defendant's fundamental constitutional rights." *Bradley*, 455 F.3d at 460 (citing *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (per curiam). Plea negotiations have indeed become "indispensable in the operation of the modern criminal justice system," *Dominguez Benitez*, 542 U.S. at 82-83, and treating Rule 11(c)(1) violations as *per se* prejudicial helps ensure that the defendant's rights at stake in those plea negotiations are afforded the proper protection.

CONCLUSION

For the reasons discussed above and in the Respondent's brief, the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

JONATHAN HACKER
CO-CHAIR, SUPREME COURT
AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5285

JOHN B. OWENS
Counsel of Record
DANIEL B. LEVIN
MICHAEL J. MONGAN
JOHN P. MITTELBACH
MUNGER, TOLLES &
OLSON LLP
355 South Grand Avenue,
35th Floor
Los Angeles, CA 90071
(213) 683-9100
john.owens@mto.com

AMICUS CURIAE BRIEF

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Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

ANTHONY DAVILA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR SCHOLARS AND PRACTITIONERS OF LEGAL AND JUDICIAL ETHICS AND LEGAL ETHICS CENTERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BRUCE GREEN
140 West 62nd Street
New York, NY 10023

THOMAS S. JONES
Counsel of Record
MARGARET C. GLEASON
MARY PAT STAHLER
JONES DAY
500 Grant Street
Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
tsjones@jonesday.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae are scholars and practitioners of legal and judicial ethics, and legal ethics centers, affiliated with various institutions or universities throughout the United States ("Ethics Amici"). Ethics Amici have extensive experience analyzing, studying, teaching and engaging in scholarship regarding the regulation of the bench and bar, including the norms of judicial conduct and the processes for formulating, interpreting and applying standards of judicial conduct.

This case implicates the interests of Ethics Amici because it involves the standards of judicial conduct and the extent of judicial authority to formulate and apply standards of judicial conduct in criminal cases to promote the independence, integrity, and impartiality of the judicial system and the fair administration of justice. Ethics Amici submit this brief to underscore a federal appellate court's supervisory authority to regulate federal trial judges' pretrial conduct in criminal proceedings when that conduct—encouraging the criminal defendant to plead guilty and cooperate with the government—is coercive and departs from the judge's role as neutral judicial officer, thereby undermining the fairness of proceedings and the integrity of the judicial process.

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[1] Pursuant to Rule 37.3(a), *amici curiae* affirm that all parties have consented in writing to the filing of this *amici curiae* brief. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel for *amici curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF CASE

This case involves the propriety of a magistrate judge's comments to a criminal defendant regarding the advisability of entering a guilty plea and cooperating with the Government. From the inception of the criminal proceedings in the Southern District of Georgia, Respondent Anthony Davila ("Davila") expressed displeasure about his court-appointed attorney, including his advice to plead guilty, as well as reservations and confusion about the proposed plea agreement, including its possible collateral effect on other criminal proceedings in the Middle District of Florida. *See* J.A. 154-55 (Feb. 8, 2010 *ex parte* hearing); J.A. 96-98, 114 (May 17, 2010 Rule 11/Change of Plea hearing); J.A. 59-60, 63-64 (Nov. 15, 2010 motions and sentencing hearing). Accordingly, Davila sent a letter to the court requesting different counsel. J.A. 146. He complained that his counsel had communicated that Davila's only option was "to plead guilty." J.A. 152.

Davila's letter prompted the magistrate judge to hold an *ex parte* hearing with Davila and his defense counsel. J.A. 146. At the outset, the magistrate judge informed Davila that the court would address Davila's letter requesting different counsel, but Davila should "[m]ake sure [he] understood that" the appointed counsel, Mr. Loebl, was "the only court appointed attorney [he] [was] going to get." J.A. 148.

The magistrate judge said that Mr. Loebl "was one of the finest law clerks" the magistrate judge had ever had and that Davila was "lucky" to have him as his attorney, and communicated that his only options were to keep Mr. Loebl or proceed *pro se*. J.A. 147-48. He referred to another defendant he had

"begged" not to proceed *pro se*, who received a life sentence without parole after representing himself at trial. J.A. 148. The magistrate judge said Davila could "be just like that guy" if he chose to proceed without his court-appointed attorney. J.A. 148.

At that point in the *ex parte* hearing, the magistrate judge went beyond denying Davila's request for new counsel out of hand, and addressed the wisdom of the court-appointed attorney's advice to plead guilty and cooperate with the Government. Those comments are at the heart of the Eleventh Circuit's decision and the question presented to this Court, and are analyzed by Ethics Amici in the Argument section of this brief at I.A and I.B. As the hearing concluded, Davila said that he would proceed with his appointed counsel rather than *pro se* "because [he] [was] on medication so there [was] no way [he] could represent [himself]." J.A. 159.

Following the *ex parte* hearing, and after plea negotiations became active, Davila signed a plea agreement and subsequently entered his guilty plea before a district judge. J.A. 81-144. At the proceeding during the colloquy, Davila, although he was represented by counsel, raised "a couple of inaccuracies" as to the timing and nature of his conspiracy charge in the indictment. J.A. 96. Specifically, the indictment indicated that the conspiracy lasted from 2005 until 2007, while Davila alleged that any conduct on his part did not begin until 2006. J.A. 96. Also, the indictment alleged that Davila impersonated a law clerk to obtain public information from court files, which Davila alleged was incorrect. J.A. 96-97. At this point, Mr. Loebl stepped in and assured the court that Davila

admitted that his conduct met the elements of the crime charged. J.A. 99. The court instructed the Government to call the special agent who investigated the crime as a witness to ensure that "a factual basis exist[ed] to support [the] the guilty plea and conviction." J.A. 99-100. The agent agreed that Davila did not know the co-conspirator at issue until 2006, but alleged that the time span referred to the tax years for which false returns were submitted. J.A. 109-10. After the special agent testified, Davila again raised that while he admitted to the special agent's testimony, "there were some inaccuracies in the indictment that [we]re relevant to [his] conduct" and to his sentencing. J.A. 114. When asked, Davila testified that he was entering into the plea voluntarily, J.A. 122, and the district judge found as much on the record. J.A. 123.

After the plea, but before sentencing, the magistrate judge granted Davila permission to proceed *pro se* and appointed Mr. Loebl as stand-by counsel. J.A. 57. Davila, at that point proceeding *pro se*, moved to vacate his plea and dismiss the indictment. J.A. 56-59.

At the motions and sentencing hearing, the district judge addressed the motions to vacate the plea and dismiss the indictment. J.A. 56-57. Davila argued *pro* se—with the same Mr. Loebl assigned as standby counsel. J.A. 56-57. This left Davila effectively without a disinterested advocate to assist him at that time in articulating a basis for vacating the plea due to coercion to plead guilty that occurred at the *ex parte* hearing. Davila argued that the indictment contained erroneous facts and that these facts would affect the criminal proceedings in the

Middle District of Florida. J.A. 59. Davila explained to the district judge that he had raised this issue at the change of plea hearing before he entered his guilty plea, *see* J.A. 96-98, and various times with his attorney. J.A. 61-63 ("When I read to the Court at the Change of Plea hearing and I talked about the inaccurate timeframes, nobody said anything about it. Nobody said anything about what is going on with these timeframes. I read it to the Court at the Change of Plea hearing. I was telling the Court, at that point in time, that there was something wrong with the timeframes.").

Davila expressed that he "was misinformed by [] counsel" and that he would never have entered into the plea if he had been told the effect it would have on the pending prosecution in the Middle District of Florida. J.A. 62-64 ("I'm trying to say he assured me that everything was going to be fine. But what happened was now I'm exposed to substantive offenses in the Middle District of Florida based on those false statements.").

When the district judge asked Davila to articulate a fair and just reason for withdrawing the plea, using the language of Federal Rule of Criminal Procedure 11(d)(2)(B), the standard for vacating a guilty plea if raised after the plea is entered, but before sentencing, Davila again referred to the misunderstanding about the plea agreement. Davila referenced his counsel, not the magistrate judge, but again referred to misinformation and confusion about the plea agreement and its effect on collateral proceedings, and that he would not have entered the plea if he had understood the effect of the very cooperation that the magistrate judge appeared to be

urging. J.A. 64-65 ("Please, I urge the Court to understand that. It was based on misinformation. Had I known -- had I known that it was going to effect [sic] me substantively in the Middle District of Florida, I would have never taken that plea, your Honor."); *see also* J.A. 62-65.

The court denied Davila's *pro se* motions to vacate the plea and dismiss the indictment, finding no fair and just reason to permit Davila to withdraw his guilty plea. J.A. 72. The court then sentenced Davila to 115 months in prison. J.A. 77-78.

On appeal, Mr. Loebl was appointed to represent Davila, but filed a motion to withdraw as counsel on the basis that no nonfrivolous grounds existed. Case No. 10-1583, Nos. 26 & 27. The United States Court of Appeals for the Eleventh Circuit denied that motion, stating its "independent review ha[d] revealed an irregularity in the statements of the magistrate judge, made during a hearing prior to Davila's plea, which appeared to urge Davila to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences." Doc. No. 31. The Eleventh Circuit then vacated the conviction, holding that the magistrate judge's comments amounted to improper judicial participation in plea negotiations, and remanded the case with instructions that it be assigned to a different district judge. *United States v. Davila*, 664 F.3d 1355 (11th Cir. 2011). The Eleventh Circuit reasoned that the participation constituted plain error and that Davila need not show actual prejudice. *Id.* at 1358-59.

SUMMARY OF ARGUMENT

I. The magistrate judge's comments about the advisability of a guilty plea, and urging the defendant to "go to the cross" and "tell it all" to cooperate with the Government, made worse by the introduction of religious imagery, were coercive. The magistrate judge abandoned the proper judicial role as neutral arbiter, and instead adopted the role of advocate or legal counselor to the defendant. The coercive effect of such comments, from a judge, is likely to be overwhelming, and, if uncorrected, eliminates any assurance that a subsequent guilty plea was voluntary. Even well-intentioned judicial comments urging a plea or cooperation are inherently coercive and violate canons, rules, and standards of judicial ethics. Jurisdictions that allow judges to play some part in plea negotiations hold that judges must not abandon the judicial role and make comments that suggest a partisan attitude about the case or the defendant, nor communicate that a plea agreement should be accepted or a guilty plea entered. Irrespective of whether the magistrate judge's comments actually influenced Davila to plead guilty here, judicial exhortations to plead guilty damage the integrity of the judiciary and criminal justice system in addition to fundamentally impairing the voluntariness of a plea and a defendant's right to a fair process.

II. The Eleventh Circuit had supervisory authority to vacate the guilty plea here based on the magistrate judge's departure from the judicial role. Indeed, a federal appellate court's supervisory authority is at its zenith when exercised over the judiciary, such as to ensure the fair administration of

criminal justice. Courts may exercise supervisory authority not just to protect individual rights, but also to protect judicial integrity and to promote confidence in the just administration of justice. On this record, no additional inquiry into actual coercion or prejudice is required or desirable. Whether or not the magistrate judge's conduct also violated Federal Rule of Criminal Procedure 11(c)(1), the record is sufficient to show inherently prejudicial, coercive judicial conduct that courts may remedy.

ARGUMENT

I. THE MAGISTRATE JUDGE'S ADVICE TO PLEAD GUILTY AND COOPERATE—INCLUDING TWICE URGING DAVILA TO GO OR COME "TO THE CROSS"—WAS COERCIVE AND A DEPARTURE FROM THE NEUTRAL JUDICIAL ROLE.

A. The Comments Violated Judicial Standards Of Conduct And Undermined The Voluntariness Of The Plea And The Fairness Of The Proceedings.

Judicial exhortations to plead guilty and cooperate with the Government, such as the magistrate judge's comments here, undermine the impartiality and integrity of the judiciary and the fair administration of justice, as well as the voluntariness of a defendant's guilty plea. A judge should not through word or demeanor communicate to a criminal defendant that a plea agreement should be accepted or that a guilty plea should be entered. Such coercive judicial participation in a defendant's decision to plead guilty and cooperate—in the context of plea negotiations or outside of that context—

undermines the integrity of, and public confidence in, the judiciary and the fair administration of justice.

Here, at an *ex parte* hearing held by the magistrate judge to address concerns raised by Davila about his court-appointed attorney, the magistrate judge went far beyond ruling on the request for new counsel, and made comments urging the advisability of a guilty plea and cooperation with the Government that were coercive. Davila's attorney never objected to the magistrate judge's comments, and perhaps not surprisingly, since the magistrate judge was endorsing that attorney's advice to plead guilty. Thereafter, the magistrate judge's comments also went unaddressed and uncorrected by the magistrate judge and the district judge before Davila's guilty plea, before the motion to vacate the guilty plea, and before sentencing. Those comments—whether well-intentioned or not—undermined the voluntariness of the guilty plea and the fairness of the criminal proceedings.

Specifically, in response to Davila's expressed concerns about his counsel's failure to propose a defense apart from pleading guilty, and that his defense counsel "thinks [Davila] ought to plead guilty," the magistrate judge responded that "oftentimes" that is the "best advice" that a lawyer can give his client. J.A. 152. The magistrate judge opined that, in view of the Government's evidence, it might be "a good idea" for a defendant to plead guilty and "not wast[e] the Court's time" and "not caus[e] the Government to have to spend a bunch of money empanelling a jury to try an open and shut case." J.A. 152-53. Davila stated that "all [he] wanted was [his] options" and that his counsel had never

explained that Davila had any choice but to accept the plea agreement proposed by the Government. J.A. 154. Davila said that not one of his communications from defense counsel addressed "a viable defense at all except for pleading guilty." J.A. 155. The magistrate judge responded "[w]ell there may not be a viable defense to these charges." J.A. 155. Additionally, the magistrate judge commented that Mr. Loebl had done his best to assist Davila, "which is far better than many other attorneys would have done on your behalf." J.A. 158. Although framed, at times, as hypothetical statements, the comments were made in direct response to Davila questioning his defense counsel's advice to plead guilty in his case. They created the clear impression, taken as a whole, that the magistrate judge was endorsing that advice.

The magistrate judge further crossed the line when discussing the possibility of the Government filing a motion for downward departure pursuant to United States Sentencing Guidelines Manual § 5K.1.1. He went far beyond explaining its effect, and again urged Davila not only to plead guilty, but to provide potentially incriminating information to the Government. Those comments included strongly worded advice to Davila that the Government "ha[s] all of the marbles" and Davila had to "go to the cross" and "tell . . . everything [he] did in this case regardless of how bad it makes you appear":

> THE COURT: . . . . The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means

> you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance. . . . In order to get the reduction for acceptance, you've got to come to the cross. You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction.

J.A. 159-61.

By encouraging Davila to plead guilty and cooperate, the court not only inserted itself into the plea negotiations, violating Rule 11(c)(1), but also abandoned its judicial role as neutral arbiter. The magistrate judge took on the role of partisan or counselor by reinforcing the advice given by Davila's defense counsel, whom Davila was challenging. It is a gross departure from the judicial role for a judge to advocate that a defendant waive his constitutional rights.

The magistrate judge's encouragement to enter a guilty plea was coercive. The magistrate judge put

the credibility and authority of the bench behind defense counsel's advice to plead guilty. At that point, a guilty plea effectively appeared to be Davila's only option to reduce his sentence, in the stated view of the court. *See* J.A. 159-60. It is natural to imagine that Davila already may have felt pressure from his defense counsel to plead guilty and cooperate with the Government. That pressure would only have been heightened by the more influential impression that the magistrate judge agreed with defense counsel. *See United States v. Tateo*, 214 F. Supp. 560, 568 (S.D.N.Y. 1963) ("The realities of human nature and common experience compel the conclusion that the defendant was enveloped by a coercive force resulting from the knowledge conveyed to him of the Court's attitude as to sentence which, under all the circumstances, foreclosed a reasoned choice by him at the time he entered his plea of guilty.").

Not only that, invoking Christian religious imagery about guilt and penitence—"you've got to come to the cross" and "tell it all"—to urge pleading guilty and cooperating with the Government contributed to the coercive nature of the comments. *See Brewer v. Williams*, 430 U.S. 387, 388 (1977) (determining that police officer's "Christian burial speech" constituted interrogation such that defendant was entitled to assistance of counsel); *see also United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (vacating sentence where sentencing judge violated due process by referencing religious beliefs at sentencing; "[o]ur Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office" but "[c]ourts, however, cannot sanction sentencing procedures that create the perception of the bench as

a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it.")[2]

The court abandoned the role of neutral again, and also exerted pressure to plead guilty, by expressing the magistrate judge's opinion that Davila had no chance of succeeding if he chose to represent himself. *See* J.A. 157 (commenting that "[i]t would be an act of sheer lunacy" for Davila to proceed *pro se*). Those comments suggested that Davila essentially had no choice but to keep his current counsel and take the court and counsel's advice to plead guilty, or he would have no chance of a successful outcome. The magistrate judge's comments about Davila's criminal history, such as that Davila is "no babe in the woods" with regard to the criminal justice system, J.A. 157-58; *see also* J.A. 160 ("and believe me, Mr. Davila, someone with your criminal history needs

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[2] In *Bakker*, the Fourth Circuit stated that "[w]hether or not the trial judge has a religion is irrelevant for purposes of sentencing," but "the apprehension that . . . a lengthy prison term [t]here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed" constituted an abuse of discretion requiring the sentence vacated and the case assigned to a different district judge. *Id.* at 740-41; *see also North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1150-52 (4th Cir. 1991) (in establishment clause context, holding that judge starting each day with a prayer "inject[s] religion into the judicial process" and "destroy[s] the appearance of neutrality"); *id.* at 1151 ("[t]his principle [of government neutrality toward religion] applies with even greater force to the judicial branch because judges are sworn to be neutral arbiters and must apply the law even-handedly without letting bias or personal feeling enter into the decision") (internal citation omitted).

a three-level reduction for acceptance"), also contributed to the coercion by going beyond merely explaining the effect of criminal history categories, and instead making statements which suggested Davila would be worse off if he proceeded to trial.

Such judicial comments urging a plea and cooperation are inherently coercive, and violate canons, rules, and standards of judicial ethics. In addition, and irrespective of whether the magistrate judge's comments actually influenced Davila to plead guilty here, such judicial exhortations to plead guilty not only fundamentally impair the voluntariness of a plea and an individual defendant's rights to a fair process, but also undermine the integrity of the judiciary and the criminal justice system.

Judicial conduct that encourages a guilty plea has long been understood to undermine the voluntariness of the plea and a defendant's constitutional right to be heard. *See Euziere v. United States*, 249 F.2d 293, 295 (10th Cir. 1957) ("A plea of guilty interposed as the result of coercion is not consistent with due process and therefore a judgment and sentence imposed pursuant to such a plea cannot stand."); *Tateo*, 214 F. Supp. at 565 ("A conviction which rests upon a coerced plea of guilty, no less than one which rests upon a coerced confession, is inconsistent with due process of law."). The "overbearing force" of statements from the court have "a subtle but nonetheless powerful influence upon the defendant" that "can hardly be questioned." *Tateo*, 214 F. Supp. at 566; *see also United States v. Miles*, 10 F.3d 1135, 1141 (5th Cir. 1993) ("Indeed, the pressure inherent in judicial participation would seem to be reason

enough to reverse a conviction when the defendant accedes to the plea suggested by the district court.")

Consistent with this, judicial standards of conduct recognize that a judge "should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." ABA Standards for Criminal Justice: Pleas of Guilty § 14–3.3(c) (3d ed. 1999) ("Criminal Justice Standards"); *see also* ABA Model Rules of Judicial Conduct R. 2.6(B) (2011) ("ABA Model Rules") ("[a] judge . . . shall not act in a manner that coerces any party into settlement"); Code of Conduct for United States Judges, [3] commentary to Canon 3A(4) (2011) ("Canons") ("[a] judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the court.").[4]

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[3] Georgia has adopted its own code of judicial conduct similar to the Code of Judicial Conduct for United States Judges. *See* Georgia Code of Judicial Conduct (2004); *see id.* at commentary to Canon 3B(8) ("Judges should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by courts.").

[4] By prohibiting judges from participating in plea negotiations, Rule 11(c)(1) aims to eliminate the opportunity for a judge to overstep its bounds or be a partisan participant in negotiations. *See United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006) (quoting *United States v. Cannady*, 283 F.3d 641, 644-45 (4th Cir. 2002) (internal quotations omitted) (the prohibition of judicial participation in plea negotiations: (i) "diminishes the possibility of judicial coercion of a guilty plea" (ii) "protects against unfairness and partiality in the judicial

In addition, coercive judicial participation in plea negotiations undermines the integrity of, and public confidence in, the judiciary and the fair administration of justice. The goal of judicial ethics, as crystallized in various canons, codes, and rules governing the judiciary, is to promote the integrity of the judicial process including by avoiding the appearance that the members of the judiciary are partisan participants in the process. *See* James J. Alfini, et al., JUDICIAL CONDUCT AND ETHICS § 1.03 (4th ed. 2007); *see also* Canon 1 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety") and ABA Model R. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"); *id.* cmt. [5] ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge"); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009) (in judicial disqualification

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(continued...)

process" and (iii) "eliminates the misleading impression that the judge is an advocate for the agreement rather than a neutral arbiter")); *see also United States v. Bierd*, 217 F.3d 15, 18-19 (1st Cir. 2000) (same); *Miles*, 10 F.3d at 1139; *United States v. Bruce*, 976 F.2d 552, 556 (9th Cir. 1992).

context, "objective standards may also require recusal *whether or not actual bias exists or can be proved.* Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'") (emphasis added) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

The fact that the magistrate judge's commentary was provided in an *ex parte* setting, outside of the presence of the Government, could contribute to the impression that the judge was Davila's trusted counselor. *See* ABA Model R. 2.6, cmt. [2] ("The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties. . . ."). Someone in Davila's shoes reasonably could conclude that the facts of the matter were decided and Davila's best option, in the court's estimation, was to plead guilty.

B. Outside Of, And Regardless Of, Rule 11, State And Federal Courts Proscribe Judicial Exhortations To Plead Guilty Or Cooperate.

Wholly apart from the requirements of Rule 11, federal and state courts have recognized that besides violating professional norms for judges, judicial exhortations to plead guilty and cooperate also violate court-established standards that federal and state courts apply to vacate guilty pleas where the record shows coercive judicial participation that implicates concerns about due process of law and a fair and neutral judiciary. Federal and state courts may exercise supervisory authority to proscribe such judicial conduct, regardless of Rule 11. Indeed, if

there had been no proposed plea agreement on the table, and no plea discussions ongoing—such that the magistrate judge's comments could not have been part of "these discussions" addressed in Rule 11(c)(1)—the comments still would have been improper.

Even in jurisdictions which have not adopted a rule of procedure analogous to Rule 11 in prohibiting all judicial participation in plea negotiations, it is well recognized that judicial exhortations to plead guilty or cooperate so impair individual rights and the judicial process that they may require that a plea be vacated. *See, e.g., State v. Bouie*, 817 So. 2d 48, 56 (La. 2002); *Standley v. Warden*, 990 P.2d 783, 785 (Nev. 1999); *People v. Sandoval*, 43 Cal. Rptr. 3d 911, 922 (Cal. Ct. App. 2006); *People v. Weaver*, 12 Cal. Rptr. 3d 742, 756 (Cal. Ct. App. 2004) (recognizing the "great risks in the trial court involving itself in the plea negotiation process" and that as "involvement increases in intensity, the risks become greater"); *see also Bruce*, 976 F.2d at 556 ("[J]udicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty.") (citing *United States v. Werker*, 535 F.2d 198, 202 (2d Cir. 1976)).[5]

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[5] Many of these state court cases cite federal authority from the Rule 11 context in connection with the rationale against judicial participation in plea negotiations. *See, e.g., Weaver*, 12 Cal. Rptr. 3d at 147 (citing *Miles*, 10 F.3d at 1139; *Bruce*, 976 F.2d at 556; and Prohibition of Federal Judge's Participation in Plea Bargaining Negotiations Under Rule 11(e) of Federal Rules of Criminal Procedure, (2000), 161 A.L.R. Fed. 537, 2000 WL 376140) as well as Criminal Justice Standard § 14–3.3(c)).

This includes in situations like this one, where a judge effectively "counsels" a defendant to plead guilty. *See, e.g.*, *Standley*, 990 P.2d at 785 ("[t]he judge thereby adopted the role of counselor to a criminal defendant, foregoing his duty as a neutral arbiter of the criminal prosecution.") (internal quotations omitted);[6] *Weaver*, 12 Cal. Rptr. 3d at 149 ("The judicial change of 'hats' in this case is head spinning. At any given time he seemed to fill the role of judge, jury, defense counsel, prosecutor, psychiatrist, social worker and victims' advocate. While in some objective sense it may be that the judge, a person of long experience, did know what was best for everyone, that is beside the point.").

These courts recognize that a "lengthy exposition" by a judge espousing the virtues of a plea or cooperation, or the risks of going to trial, may inappropriately "effectively convince[]" a defendant to accept a plea agreement. *Standley*, 990 P.2d at 785. These decisions recognize that—outside of Rule 11(c)(1)'s absolute prohibition against judicial participation in plea negotiations—there is a line that judges may not cross between acceptable judicial involvement and unacceptable coercion. *See Bouie*, 817 So. 2d at 56 (recognizing that "a fine line may at times separate a trial judge's attempts to insure that the defendant understands that a guilty plea might

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[6] The Nevada Supreme Court later adopted a bright-line prohibition against judicial participation akin to Rule 11, finding that "the inherent and unacceptable risks involved in judicial participation in the plea process" could not be sufficiently mitigated by the approach in *Standley*. *Cripps v. State*, 137 P.3d 1187, 1191 (Nev. 2006).

serve his best interest and the overbearing of a defendant's will to reach a result the court, with the best of intentions, deems appropriate"); *Standley*, 990 P.2d at 785 (recognizing that it is not necessarily improper for a judge to "facilitate the plea negotiations or make an isolated comment about the plea offer").

For example, in *Bouie*, a trial judge's explanations of the possible outcomes the defendant faced at trial, that the judge had discretion to impose harsher penalties in the event of a conviction than for a plea bargain, and of the legal principles underlying a verdict "were not inherently coercive because the advice concerned information that an accused ought to possess to enter a knowing and intelligent guilty plea." *Bouie*, 817 So. 2d at 55. However, after properly assuring that the defendant was aware of the terms of the plea, when the judge continued, plying the defendant "with his personal view that the result of a jury trial was all but a foregone conclusion, he went beyond simply facilitating the entry of a knowing and voluntary guilty plea." *Id.* Just as in *Standley*, the judge's repeated references in *Bouie* to his time as a prosecutor—"I don't think I've ever seen more than one or two people who went to trial found not guilty"—crossed the line from neutral arbiter to "advocate." 817 So. 2d at 56; *see also id.* at 50. Similarly here, the record of the *ex parte* hearing shows the magistrate judge crossing the line from neutral arbiter to partisan or judicial

"advocate," urging a particular course of conduct to the defendant.[7]

At the heart of these decisions, even in jurisdictions that allow some judicial involvement in plea negotiations, is the recognition that judicial participation in plea negotiations carries with it great risk of exerting undue influence, and coercive judicial involvement is forbidden and requires vacating the plea. A judge may ensure that a plea is voluntarily and knowingly made, but it is something else entirely when he "brings to bear the full force and majesty of [the judicial] office" to effect an outcome he prefers. *United States v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966); *see also Standley*, 990 P.2d at 785 (finding improper judicial participation where "[i]n commenting on the offer, the judge evinced an unmistakable desire that appellant accept the offer" and that only where coercion is present "will we consider affording a defendant an opportunity to withdraw his or her plea").

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[7] *See also* Resp. Br. at 21-24 & n.1 (discussing cases and commentary before, or outside of, Rule 11(c)(1)'s bright-line prohibition against judicial participation).

II. APPELLATE COURTS CAN VACATE A GUILTY PLEA WITHOUT REMANDING FOR ADDITIONAL INQUIRY WHEN THE RECORD, AS HERE, SHOWS INHERENTLY PREJUDICIAL JUDICIAL CONDUCT.

A. The Eleventh Circuit May Exercise Supervisory Authority Over The Administration of Justice To Vacate The Plea, And A Federal Appellate Court's Supervisory Authority Is At Its Zenith When Exercised Over The Conduct Of Lower Court Judges.

This Court may affirm as a proper exercise of the Eleventh Circuit's "supervisory authority over the administration of criminal justice in the federal courts." *See Offutt v. United States*, 348 U.S. 11, 17 (1954) (quoting *McNabb v. United States*, 318 U.S. 332 (1943) (superseded by statute)); *Thomas v. Arn*, 474 U.S. 140, 148 (1985).[8] A federal court may formulate and apply procedural rules not specifically required by the Constitution or Congress, so long as doing so does not conflict with constitutional or statutory provisions. *Bank of Nova Scotia v. United*

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[8] One underpinning for the Eleventh Circuit's decision is the proper exercise of its supervisory authority. *See Davila*, 664 F.3d at 1358 (citing *United States v. Diaz*, 138 F.3d 1359, 1362 (11th Cir. 1998) (recognizing that "[a] violation of Fed. R. Crim. P. 11[] is plain error and, pursuant to its supervisory power over the district courts, the court of appeals may raise such a violation *sua sponte* and order a resentencing of a defendant who pleads not guilty and demonstrates no actual prejudice in his trial or sentence.")) (citing *United States v. Adams*, 634 F.3d 830, 831-32 (5th Cir. 1981)). The Government addresses supervisory authority in recognition that it may be a basis for affirming the Eleventh Circuit's decision. *See* Pet. Br. at 16-20.

States, 487 U.S. 250, 254 (1988) (citing *United States v. Hasting*, 461 U.S. 499, 505 (1983)); *Thomas*, 474 U.S. at 148). Here, the Eleventh Circuit enforced a well recognized prohibition against a trial judge urging a guilty plea or cooperation that is consistent, and does not conflict, with relevant constitutional and statutory provisions.

Indeed, "[t]his [supervisory] power rests on the firmest ground when used to establish rules of judicial procedure." *Thomas*, 474 U.S. at 146-47 n.5 (citing Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1465 (1984)); *id.* at 146-47 ("It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. . . . Indeed, this Court has acknowledged the power of the courts of appeals to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'") (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 n.10 (1980); quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)) (internal citations omitted). Moreover, there is no separation of powers concern when the supervisory authority is exercised over the judiciary, rather than another branch of Government. The Constitution permits "[t]he judicial power of the United States," Art. III, § 1, to be vested in federal courts and exercised by federal judges by virtue of their Article III commissions.

A federal appellate court's ability to exercise its supervisory authority is at its zenith when

proscribing inherently prejudicial conduct by a federal district or magistrate judge that interferes with the fair administration of justice—and this includes conduct such as the magistrate judge's comments evidenced by the record here urging a guilty plea and cooperation. *See Offutt*, 348 U.S. at 17 (reversing contempt finding based on supervisory authority where judge "instead of representing the impersonal authority of law" "permitted himself to become personally embroiled" in a way that "precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury"); *id.* at 18 ("To sanction such a course of procedure would give it encouragement"); *see also Marshall v. United States*, 360 U.S. 310, 310-11 (1959) (granting a new trial based on the exercise of supervisory powers "to formulate and apply proper standards for enforcement of the criminal law in the federal courts" despite broad discretion afforded to the trial court to assess prejudice from jurors' exposure to news articles).

Courts exercise supervisory authority not just to protect individual rights, but also to protect judicial integrity and to promote public confidence in the just administration of criminal justice. In *Ballard v. United States*, 329 U.S. 187 (1946)—a case decided well before *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)—this Court "conclude[d] that the purposeful and systematic exclusion of women from the [jury] panel" authorized the Court to "exercise our power of supervision over the administration of justice in the federal courts . . . to correct an error which

permeated this proceeding." *Id.* at 193. "[R]eversible error does not depend on a showing of prejudice in an individual case"; where the "evil" lies in the exclusion of a particular class "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.* at 195. So too here. The injury is not limited to undermining the voluntariness of Davila's plea and his right to a fair and impartial process, but also impacts public confidence in the judiciary and the fair administration of justice.

The United States gives any "supervisory authority" argument that may be underpinning the Eleventh Circuit's decision short shrift. *See* Pet. Br. at 16-20. Nothing in this Court's prior decisions, or Federal Rules of Criminal Procedure 11(h) and 52, however, eliminates a federal court's ability to exercise supervisory authority to proscribe federal judicial conduct that is inherently prejudicial like the magistrate judge's exhortations to plead guilty and cooperate illustrated on the record here.

The Government relies on *Bank of Nova Scotia*, 487 U.S. 250. *See* Pet. Br. at 18-19. In that case, the Court addressed whether prosecutorial misconduct in grand jury proceedings warranted dismissal of an indictment absent any showing of prejudice. 487 U.S. at 252. That situation is far different from a judicial officer urging a defendant to plead guilty and cooperate and waive the right to trial and other important rights. Indeed, in *Bank of Nova Scotia*, this Court addressed the distinction between errors that may or may not be prejudicial, on the one hand, and those that are inherently prejudicial, on the

other hand. The Court recognized that the rule applied in that case would not apply where "[t]he nature of the violation allow[s] a presumption that the defendant was prejudiced, and any inquiry into harmless error would require unguided speculation." *Id.* at 257. While a federal court may not invoke supervisory power to circumvent the harmless error inquiry in Federal Rule of Criminal Procedure 52 in that context, *id.* at 254-55, the holding in *Bank of Nova Scotia* would not apply to "fundamental" errors or where "structural protections" were "so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 256-57. Here a presumption of prejudice is appropriate given the nature of the magistrate judge's coercive comments and his departure from the neutral judicial role.

As the Respondent's brief illustrates, in enacting Rule 11(h) Congress did not mean to preclude the exercise of supervisory authority in a case like this one where the Rule 11 violation is accompanied by inherently prejudicial judicial conduct urging a plea and cooperation. *See* Resp. Br. at 13, 24-30. In addition, the record here illustrates judicial conduct that is not just a technical judicial error or a Rule 11(c)(1) error. Even in the Rule 11 context, as Respondent argues, Resp. Br. at 50-51, 24-30, this error is different in kind from the technical Rule 11 errors that this Court previously considered in *Dominguez Benitez*, *Vonn*, and even *McCarthy*. *See United States v. Dominguez Benitez*, 542 U.S. 74 (2004) (unobjected-to error in guilty plea colloquy did not warrant vacatur); *United States v. Vonn*, 535 U.S. 55 (2002) (same); *McCarthy v. United States*, 394 U.S. 464 (1969) (vacating guilty plea where

district court accepted guilty plea without personally addressing defendant to ensure that he understood the nature of the charges); *see also United States v. Baker*, 489 F.3d 366, 372 (D.C. Cir. 2007) ("[N]ot all Rule 11 violations are created equal."). The United States, however, urges a result that would paint all Rule 11 violations with the same broad brush and preclude the exercise of supervisory authority to proscribe judicial misconduct far more prejudicial than a Rule 11 violation.

B. No Additional Inquiry Into Actual Prejudice Is Required Or Advisable Where, As Here, The Record Is Clear That Coercive Conduct Occurred And The Magistrate Judge Departed From The Neutral Judicial Role.

When a judicial officer, as in this case, abandons all pretense of neutrality, a further inquiry, after the fact, as to whether a judge's comments actually influenced a defendant to plead guilty belies the serious and damaging nature of the conduct at issue. For that reason, courts within and outside of the Rule 11 context consistently vacate pleas without remanding for additional inquiry into prejudice where the record is clear that coercive judicial conduct preceded a guilty plea and was not corrected. *See, e.g., Bruce*, 976 F.2d at 561 (vacating plea without remanding for inquiry into prejudice in Rule 11 context in light of judicial involvement in plea negotiations); *Miles*, 10 F.3d at 1142 (same); *Tateo*, 214 F. Supp. at 568 (vacating plea without remanding for inquiry into prejudice in 28 U.S.C. § 2255 context in light of coercive judicial conduct); *Euziere*, 249 F.2d at 295 (same); *Weaver*, 12 Cal. Rptr. 3d at 757 (reversing denial of appellant's

motion to withdraw his plea without remanding for inquiry into prejudice outside of the Rule 11 context); *Bouie*, 817 So. 2d at 56 (concluding, without remanding for inquiry into prejudice and outside of the Rule 11 context, "that the defendant's guilty plea under these circumstances was not knowingly and voluntarily entered, such that the district court abused its discretion in not granting the defendant's motion to withdraw the guilty plea."). No subsequent inquiry into actual prejudice is required.[9]

This is true whether or not such conduct also happens to constitute a violation of Rule 11(c)(1).[10]

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[9] Ethics Amici have identified two less recent cases where state courts addressed some level of judicial encouragement to plead guilty and did not vacate the plea. Even in those cases, which are not dispositive here, the appellate courts ruled without remanding for further inquiry. *See People v. Davis*, 54 A.D.2d 913 (N.Y. App. Div. 1976) (determining without remanding that, based on the record there, vacatur was not warranted where defendant pled guilty on the eve of trial when faced with overwhelming evidence after conclusion of a suppression hearing, and not immediately after the judge urged him to do so); *People v. Earegood*, 173 N.W.2d 205 (Mich. 1970) (finding vacatur was not warranted, but remanding for re-sentencing, where judge warned defendant of the consequences of delay in entering a guilty plea and its affect on sentencing, and defendant later entered guilty plea).

[10] Ethics Amici submit that the Eleventh Circuit had supervisory authority to vacate on this record without a further inquiry into actual prejudice regardless of whether the conduct also violated Rule 11(c)(1). This position, however, also accords with Rule 11 concepts. Couched in the language of Rule 11, if plain error is the standard, the Court may hold, like the Eleventh Circuit, that the plain error standard is necessarily met because coercive judicial participation such as the record shows here "seriously affect[s] the fairness, integrity

As Respondent argues, an inquiry into the defendant's reasons for pleading guilty—and whether the magistrate judge's conduct was determinative and actually coerced Davila to plead guilty—would be unduly burdensome, intrusive and speculative. *See* Resp. Br. at 30-50.

More fundamentally, where a judge urges a guilty plea or cooperation, as occurred here, the plea should be vacated because the comments are damaging and inherently prejudicial to the individual defendant as well as to the judiciary and public confidence in the fair administration of justice. No additional inquiry is necessary, and no showing of actual coercion or prejudice is required, where the record is sufficient, as here, to show such improper judicial exhortation to plead guilty and cooperate occurred.

Remanding for additional inquiry into prejudice is unnecessary. Reversing the Eleventh Circuit sends the wrong message to the judiciary and to the public, as well as fails to pay due regard to the trial court's obligation to ensure, not undermine, the

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(continued...)

or public reputation of judicial proceedings," *Vonn*, 535 U.S. at 62-63 (internal citations and quotations omitted), without a showing of individualized prejudice. *See Davila*, 664 F.3d 1355. In the alternative, the Court could hold that the plain error standard does not apply, *see Baker*, 489 F.3d at 372-73, to such a fundamental and non-technical breach of Rule 11(c). *See* Resp. Br. at 31-34 (addressing errors that qualify for correction without a specific showing of prejudice); *id.* at 21-24, 50, 51-54 (distinguishing judicial exhortation errors from technical violations of Rule 11 and arguing that the plain error standard should not apply).

voluntariness of a guilty plea and the fairness of criminal proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

Bruce Green
140 West 62nd Street
New York, NY 10023

Thomas S. Jones
Counsel of Record
Margaret C. Gleason
Mary Pat Stahler
JONES DAY
500 Grant Street
Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
tsjones@JonesDay.com

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APPENDIX

APPENDIX: List Of *Amici Curiae*

Bruce Green is the Louis Stein Professor and Director of the Louis Stein Center for Law and Ethics at Fordham University School of Law.

The Louis Stein Center for Law and Ethics at Fordham University School of Law examines the critical role of lawyers in building a more just society, and explores how ethical values inform and improve the legal profession. The Stein Center supports a wide range of conferences, publications and independent research.

James J. Alfini is Dean Emeritus and Professor of Law at South Texas College of Law.

Mark I. Harrison is a Partner at Osborn Maledon, P.A., Phoenix, Arizona and Former Chair, ABA Commission to Revise the Code of Judicial Conduct (2004-2007).

Renee Newman Knake is an Associate Professor of Law at Michigan State University College of Law, and co-director of the Kelley Institute of Ethics and the Legal Profession.

Lisa G. Lerman is a Professor of Law and Coordinator of Clinical Programs at The Catholic University of America.

Peter Margulies is a Professor of Law at Roger Williams University School of Law.

Daniel S. Medwed is a Professor of Law at Northeastern University School of Law.

Judith L. Maute is the William J. Alley Professor of Law at University of Oklahoma College of Law.

New York Law School Center for Professional Values and Practice focuses on the changing

conditions of law practice in the U.S. and abroad. Through classwork, case studies, Center events, and independent projects, students learn about the conditions of practice in a variety of settings. The goal of the Center is to provide students with a sophisticated understanding about the conditions of modern law practice and to equip students for successful careers in the next generation of practice organizations.

University of Miami School of Law's Center for Ethics & Public Service, founded in 1996, is an interdisciplinary program devoted to the values of ethical judgment, professional responsibility, and public service in law and society.

Richard W. Painter is a Professor of Law at the University of Minnesota Law School.

John P. Sahl is a Professor of Law and Faculty Director of the Miller-Becker Center for Professional Responsibility.

The Joseph G. Miller and William C. Becker Center for Professional Responsibility at University of Akron Law School was founded in 1993 as the Joseph G. Miller Institute for Professional Responsibility and rededicated in 2003 as the Joseph G. Miller and William C. Becker Center for Professional Responsibility. The Center is involved in lectures, presentations, conferences, and symposia that focus on lawyer and judicial ethics and professional responsibility.

Ellen Yaroshefsky is a Clinical Professor of Law and Director of the Jacob Burns Ethics Center in the Practice of Law at Cardozo School of Law.

The Jacob Burns Center for Ethics in the Practice of Law sponsors courses, programs, and events that provoke dialogue and critical thought on ethical and moral issues of professional responsibility. The Center helps prepare students to face with integrity the difficult and important questions that arise in all areas of legal practice.